No. 11638.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES MCLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, and RAY J. MORKOWSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

This case involves appeals from judgments of the District Court entered upon the jury's verdict in a criminal prosecution under Section 1 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A., Sec. 1, as amended [R. 75-98].

On August 23, 1946, an indictment was returned against Local 36 of the International Fishermen and Allied Workers of America and 15 of its officers and members,

charging them with conspiring to fix, determine, establish, and maintain artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters of the Pacific Ocean, both territorial and foreign, off the coast of California, in the area from Morro Bay off the Southern California Coast to and including the territorial waters of the West Coast of Mexico [R. 2-20]. A motion to dismiss the indictment was filed on September 23, 1946 [R. 21-22] and was overruled on November 12, 1946 [R. 24-25]. On February 11, 1947, a motion was filed to dismiss the indictment on the ground that the Grand Jury which returned the indictment was improperly selected and to strike out the trial jury panel in its entirety because it was selected improperly [R. 25-28]. After hearings on this motion, it was overruled [R. 28-29, 2523-2574]. Trial of the cause began on March 18, 1947, and closed on May 7, 1947. On May 7, 1947, the jury returned a general verdict of guilty as to all defendants [R. 67-68], except defendant Floyd Sherman in whose behalf the trial court directed a verdict of acquittal at the close of the Government's case [R. 32-33]. On May 12, 1947, defendants filed a motion in arrest of judgment [R. 68-69] and a motion for judgment of acquittal or for a new trial [R. 70-71]. Both motions were overruled [R. 72-73]. On May 21, 1947, the trial court entered judgment and commitment as to each defendant found guilty and imposed fines totalling $12,090.00 [R. 73-98]. This appeal was taken from the judgments of the trial court entered upon the jury's verdict.

STATUTE INVOLVED.

The indictment charged violations of Section 1 of the Sherman Act. This section, in so far as is material, provides:

> Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE INDICTMENT.

The Indictment [R. 2-20] charges that all of the defendants are members of the defendant Association, and have either been concerned with and participated in the management, direction, and control of the policies and activities of the defendant Association, or have authorized, ordered, or participated in the activities constituting the offense described in the Indictment. The Indictment discloses that only eight of the individual defendants are fishermen [R. 4-6].

The Indictment charges, and the evidence shows, that approximately 20,000,000 pounds of fresh fish, with a retail market value of over $9,000,000, are caught annually in the fishing area and are sold to dealers[1] located at the fishing ports of Morro Bay, Santa Barbara, Santa Monica,

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[1]Fresh fish sold to canneries is not involved in this case.

Redondo Beach, San Pedro, Newport Beach and San Diego in Southern California [R. 6-7; Gov. Exs. 34 and 35, R. 842].

The Indictment alleges that the fishermen members of the defendant Association are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen, engaged in business on their own account, and operate fishing boats for their own account and profit. The Indictment further alleges that no employer-employee relationship exists between the fishermen and the dealers to whom their catch is sold, and that the fishermen members of the defendant Association sell their catch directly to dealers, and do not act collectively through the defendant Association in catching, producing, preparing for market, processing, and handling their catch [R. 7].

The Indictment further alleges that the conspiracy began sometime prior to May 1946 and consisted of a continuing agreement

> (a) to fix the minimum prices to be charged by the fishermen for the sale of fresh fish caught by them in the fishing area and thereafter sold by the fishermen to dealers;
>
> (b) that the minimum prices to be paid by the dealers to the fishermen would be the maximum price as set by the OPA, where such agency had fixed a price for fresh fish;
>
> (c) that when any ceiling prices set by the OPA for fresh fish sold to dealers by fishermen were removed, the maximum OPA price would remain the minimum price charged for any fish so sold to dealers by the fishermen;

(d) that when no OPA price had been set, the Association would agree with the dealers on the price to be paid the individual members of the defendant Association for all fish sold by any member to dealers;

(e) that the prices of fish sold by the members of Local 36 should be stabilized and non-competitive;

(f) that the aforesaid agreement as to prices should be reduced to written contract form,[2] and imposed upon fish dealers who refused to sign the written contract form by picketing and boycott methods, and to prefer dealers signing the written contract form and to refuse to sell or deliver any fish caught by members of defendant Association to dealers who would not sign the written contract form [R. 8-9].

The Indictment further alleges that as part of the conspiracy the defendants also agreed

(g) to prevent dealers who refused to sign the written contract form from securing any supply of fresh fish from any fishermen or any other source by picketing and boycott methods;

(h) that they would prevent such non-signing dealers from shipping or transporting through their own or other means of transportation any fish purchased or acquired by them;

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[2]A copy of the price-fixing agreement in written contract form as submitted to the dealers for signature pursuant to the conspiracy is affixed to the Indictment as Exhibit "A" [R. 14-21, incl.]

(i) that they would picket and boycott any concern or individual accepting any fresh fish for shipment from such non-signing dealers to points in or outside the State of California;

(j) that they would also boycott and picket any concern or individual who attempted to deliver to the usual place of business of the non-signing dealer any fresh fish shipped to such dealer by brokers or dealers located in or outside the State of California; and

(k) that they would also prevent fishermen who were not members of the defendant Association from fishing and delivering any fresh fish to anyone other than a dealer who signed the price-fixing contract, and then only to such a dealer after said non-member fishermen had picketed the non-signing dealers, or, in lieu thereof, had paid a stipulated picket fee to the defendant Association [R. 7-10].

The Indictment also alleges that the defendants had submitted the written form of the price-fixing contract to all dealers in and around the fishing ports before described, and that the defendants, for the purpose of forcing and coercing fish dealers into signing the form of price-fixing contract, had threatened to withhold and had withheld from such non-signing dealers supplies of fresh fish, and by picketing and boycotting methods had attempted to prevent and had prevented the dealers who refused to sign said form of contract from securing fresh fish from other sources [R. 10-11].

I.
STATEMENT OF FACTS.

The evidence shows that members of the appellant Association caught and delivered approximately 90% of the fresh fish landed in the fishing ports north of San Diego named in the Indictment [Gov. Ex. 409, R. 1117]. In addition to the fresh fish caught in the fishing area and landed at said fishing ports, more than one million pounds of fresh fish is shipped annually from the States of Oregon and Washington to dealers located at said fishing ports [Gov. Exs. 34 and 35, R. 842].

A. The Relationship Between the Fishermen and the Dealers Is That of Sellers and Buyers of Fish, and Not That of Employees and Employers.

Approximately 55% of the members of the appellant Association classified themselves on their membership application cards as self-employed fishermen [R. 1769]. Many of the fishermen members of the Association, as well as many non-member fishermen, owned and operated their own fishing boats and fishing equipment [R. 1370].

The fishermen sell their fish to the dealers, and the price paid by a dealer to a fisherman is a matter of open negotiation between the fisherman and the dealers on the wharf at the time of the sale [R. 137-8, 279, 370-1, 380, 513, 1458, 1461, 1477-8].

The fishermen are paid cash at the time of the sale of there is more than one fisherman on a boat, the captain or skipper of the boat usually does the bargaining with

the dealers for the sale of the catch and the fishermen receive a share of the total proceeds from the sale for their services [R. 453, 513, 548, 767, 798, 851, 866, 873, 924-5, 1446, 1455, 1472]. The record is replete with numerous references to these open negotiations for the sale of the catch between the fishermen and the dealers, and the record shows that these negotiations are referred to as purchases or sales, and that the dealers and fishermen are referred to in these negotiations as "buyers" and "sellers" of fish [R. 139, 286-7, 381-2, 439-40, 472, 485, 493, 804-5, 851-2, 905-6, 1488, 1702, 1714-5].

The record shows further that the individual fishermen themselves determine when and where they will fish, and that where there are two or more fishermen on a boat and one of the fishermen owns and operates the boat and gear, a share of the proceeds of the catch is allocated to the boat and gear [R. 1474]. The individual fishermen, in carrying on their fishing operations, do not receive any compensation from any dealer, and are not subject to the direction and control of any dealer as to when or where they will fish or what fish they will endeavor to catch [R. 440, 472, 485, 493, 804-5, 812, 905-6, 973, 1488, 1702, 1714-5].

The price received by the fishermen for their catch is determined by the law of supply and demand, and fluctuates according to the scarcity or surplus of supply [R. 258, 279-81, 367, 960-3]. The fisherman regards himself as independent of any dealer and he is not subject to the orders or control of any person other than himself or the captain of the boat on which he fishes in carrying on his fishing operations [R. 485].

B. The Association Is Not a Common or Collective Marketing Agency.

The record shows that the fishermen sell their catch to a dealer or dealers as they come in with each load, and such sales are individual sales and are not made by or through the appellant Association [R. 1448, 1461, 1475, 1598-9, 1606, 1699, 1705]. There is no evidence in the record that the appellant Association itself ever sold any fish for its members or was ever paid for any fish sold by its members to dealers. There are many fishermen who are not members of the Association [R. 1517].

C. The Price Fixing Conspiracy.

As early as 1944, the appellant Association entered into so-called "closed shop" contracts with dealers, which fixed the price to be paid by the dealers for all fish sold to them by members of the appellant Association [Gov. Ex. 240, R. 1384]. Paragraph 3 of this exhibit suggests that some of the practices resorted to in this case by the appellants were instituted on a small scale by the appellants at that time. This paragraph provides that after notice from the appellant Association, a dealer would not purchase fish from any fisherman who was not a member in good standing of the appellant Association [R. 1384]. Dealers were furnished with the names of fishermen who were not members of the Association in order to effectuate the "closed-shop" provision of the 1944 contract [Gov. Ex. 413, R. 1442; Gov. Ex. 414, R. 1442].

In April 1946, members of the appellant Association held a meeting at which it was agreed that a contract fixing the minimum price to be paid by dealers for barracuda would be entered into with all Southern California fresh

fish dealers, and this minimum price was to be the OPA maximum price [Gov. Ex. 201, R. 1115; Deft. Ex. R, R. 1308]. On April 25, 1946, the records of the appellant Association point out that it then had sufficient members to put up a unified front on a coastwide program "in an effort to stabilize fish prices" [Gov. Ex. 202, R. 1115]. On May 17, one of the appellants wrote a letter as representative of the appellant Association, setting forth the plan of action to be followed by the Association and its members in getting the price-fixing contract signed by the dealers. It states:

> On Monday, May 20, 1946 a contract will be presented to each dealer in this area. The committees will personally present the contract in San Pedro, Newport and Santa Monica simultaneously. They will be given forty-eight (48) hours to sign. If the contracts are not signed by 7:00 A. M. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California. We have then given the dealers to June 1, 1946 to sign, or after that time we will endeavor to stop the flow of all northern fish into this area as well. [Gov. Ex. 203, R. 1115.]

The price-fixing contract form which was prepared by the appellant Association [Gov. Ex. A attached to the Indictment, and Gov. Ex. 3 in evidence; R. 14-20, 148] contains provisions fixing the maximum OPA price as the minimum price [Par. 4A, R. 16]; and provides that when OPA price ceilings are removed, the maximum OPA price shall remain the minimum under the contract [Par. 4C, R. 16].

The contract form also indicates by its language that its purpose is to stabilize the distribution as well as the

price of fresh fish, and that all dealers signing the contract will be given equal and first preference in the purchase of all fish caught by members of the Association [Par. 3, R. 16].

Paragraph 6 of this contract form provides that the dealer shall make payment directly to the members of the Association for any fish purchased, while Paragraph 7 provides that the appellant Association, referred to in the contratct form as a Union, "* * * assumes no liability of any kind under the terms of this agreement, * * *" [R. 17].

The contract form was submitted to the dealers at the fishing ports previously mentioned in the latter part of May, 1946, and the dealers at such ports were informed that if they did not sign the proposed contract they would not receive any fish from any members of the Association, or from any other fishermen, and they would be prevented, by picketing and boycotting methods, from receiving fresh fish from any other source [R. 166, 437; Gov. Ex. 203, R. 1115]. The record shows that some of the dealers at Newport Beach and at fishing ports other than San Pedro signed the contract, but that none of the fish dealers at San Pedro signed the contract when it was presented to them[3] [R. 1659; Gov. Ex. 211, R. 1118; Gov. Ex. 303,

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[3]At Newport Beach, two of the dealers refused to sign the proposed contract but three of the dealers there did sign the contract. The evidence shows that the three dealers who signed the contract continued to receive all of the fresh fish they desired during the so-called "strike," whereas the two non-signing dealers were picketed and boycotted by members of the appellant Association and were prevented from acquiring or securing any fresh fish to the same extent and in the same manner as the non-signing dealers at San Pedro [R. 788-9, 808-9, 858-62].

R. 1118]. The record shows that when the contract form was presented by the appellant Zafran to one of the San Pedro dealers for signature, the latter was told that if he did not sign, ways and means would be found to compel him to sign [R. 147].

The appellants further showed their intention to stop all commerce in fresh fish into Southern California unless the dealers signed the price-fixing contract when, on May 18, appellant Zafran, secretary of the Association, notified one of the Santa Barbara fish dealers that "All dealers from Santa Barbara to San Diego will be signatories to the enclosed agreement. Unless the agreement is signed by the time specified therein, it is possible that the flow of all fish into Southern California may cease * * *" [Gov. Ex. 27, R. 1115-6]. From that time on events moved rapidly and finally culminated in the so-called strike which commenced on May 29.

On May 21 a meeting of the membership of the Newport Beach unit of the appellant Association passed a resolution which read in part as follows: "Moved, seconded and carried that we deliver fish only to the markets that have signed * * *" [Gov. Ex. 204, R. 1117]. On May 25, the minutes of a joint executive committee of the appellant Association [Gov. Ex. 205, R. 1117] show that it went on record demanding a minimum price stabilization contract with all dealers in the territory from Morro Bay to San Diego and that units were urged to authorize a "strike" to enforce the demands against the dealers not signing the contract form. Dealers were to be delivered fish provided they agreed not to sell any non-signing dealer.

The minutes of a membership meeting of the appellant Association dated May 27 [Gov. Ex. 302, R. 1117] point up and describe the tactics used by the Association to force the non-signing dealers into the price fixing contracts. The appellants' activities are further outlined in a letter of the same date from the appellant Association to the San Pedro fish dealers which states [Gov. Ex. 236, R. 1124]: "After a joint-meeting of the San Pedro Dealers and Fishermen it has been decided that if a minimum price agreement has not been signed by the San Pedro fresh fish dealers not later than Tuesday, May 28, 1946, 6:00 p. m., that no fish of any kind will be brought into San Pedro, starting 7:00 a. m., Wednesday, May 29, 1946." This was the final ultimatum to the non-signing dealers at San Pedro. The so-called "strike" commenced on May 29.

From and after the receipt of the ultimatum given by the representatives of the appellant Association, non-signing dealers at San Pedro were picketed and boycotted by the appellants and members of the appellant Association for over a month and were prevented from securing any fresh fish from fishermen members of the appellant Association, or from non-member fishermen, and they were also prevented from receiving shipments of fresh fish at their usual places of business from points outside the State of California [R. 156, 163-4, 171, 185, 313, 317-8, 329, 397-400, 402-3]. As was stated by one of the San Pedro dealers in answer to a question as to whether he purchased any fish from fishermen on the sea side of his establishment or received any deliveries of fish from points outside the State of California at his place of business during the so-called "strike," his answer was: "No, sir, I was closed entirely." [R. 317]. The testimony of other

non-signing dealers at San Pedro and Newport Beach was to the same effect [R. 156, 171, 185, 313, 329, 400, 402].

Documents from the files of the appellant Association show the progress of this so-called "strike" and the use of the picketing and boycotting methods by the appellant Association against the non-signing dealers in preventing them from securing any fresh fish to carry on their business. For example, Government Exhibit 303 [R. 1118], reads in part: "Redondo beach dealers signed. Santa Monica have closed shop—San Pedro is still out with pickets out."

On June 28, a letter was sent by the appellant Association to the Newport Beach and San Pedro dealers [Gov. Ex. 37, R. 1402] in which it was pointed out that fresh fish were to be delivered to dealers only on the basis of minimum prices established by the Association, and that future deliveries would be made only on that basis. Picketing and boycotting of non-signing dealers were to cease only when the dealers signed the agreement [Gov. Ex. 233, R. 1123; Deft. Ex. W, R. 1354].

1. Coercion of and Pressures Brought to Force Non-member Fishermen to Participate in the Boycott.

The evidence shows that fishermen who were not members of the appellant Association and who customarily sold their catch to dealers at San Pedro were prevented from selling to non-signing dealers by appellants and members of the appellant Association [R. 446, 452-3, 456, 465-6, 483-4, 488-9, 491-2, 504, 551, 768, 779, 785, 802]. These non-member or independent fishermen were required to secure a "clearance card" from the "visiting" or "cooperative committee" of the appellant Association before they were permitted to leave the harbor to go fishing, and could

only sell their catch to dealers who signed the price-fixing contract form [R. 442-5, 464-8, 481-3, 491-2, 500-1, 519-22]. As was stated by Mr. Castagnola, one of the non-member fishermen who owned his own boat: "They will tell you if you can go out fishing or not." [R. 444]. After appearing before the committee of the appellant Association to secure a "clearance card" to fish, the non-member fishermen left the room while the committee passed upon the request of the non-member fishermen for a clearance card. If the request for the clearance card was granted, they were permitted to fish but were told that they could only sell their fish to signing dealers [R. 445, 1491-2].[4]

The non-member fishermen who were required to get clearance cards from a committee of appellant Association, in order to fish and sell any fish caught, could secure such clearance cards only after they had picketed non-signing dealers or, in lieu thereof, had paid a picket fee to the appellant Association [R. 468-9, 477-8, 492-3, 501-5, 510-12, 522-3, 530-2, 544, 552-3, 774-5, 788-9, 803-4, 868-9].[5] As one of the non-member fishermen testified,

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[4]This action of the appellant Association resulted in the signing dealers at Newport Beach receiving all of the fish caught by the independent San Pedro fishermen as well as the San Pedro members of appellant Association, during the month of June and part of the month of July, 1946, when the so-called "strike" was called by the appellant Association to force the non-signing dealers to sign the price-fixing contract [R. 471].

[5]The tactics, or procedure, used by the appellant Association to bring independent fishermen into line with their efforts to force the price-fixing contract on the dealers is illustrated by the testimony of one of the non-member fishermen. He testified that he was told by one of the appellants: " 'You fellows have to picket to go out again, or else you have to stop fishing.' So he told us to go to the office and see the officials over in the office to get a clearing card." [R. 478].

"We went in and asked them for a clearance card, so they said they had to call a little meeting. We had to step outside for a few minutes to see what they would decide, and finally they said that they would give us a card according we did picket duty." Question: "Was there anything said about where you could sell your fish?" Answer: "On the dock down there Tommy [the appellant Otis W. Sawyer] said we could either take the fish to Newport and deliver it to the Cooperative, Western Canners and Poladini [the three signing dealers at Newport] * * *" [R. 482-3].[6]

Several other non-member fishermen testified concerning the requirements imposed upon them by the appellant Association during the period of the so-called "strike" against the non-signing dealers in order to secure clearance cards [R. 447, 468-9, 484, 503-4].

The strike committee minutes of the San Pedro unit of the appellant Association for May 30 [Gov. Ex. 207, R. 1118] refer to 35 boats to be contacted and if they do not help in the strike, "action is to be taken against them."

No clearance cards were to be issued without the consent of the strike committee [Gov. Ex. 212, R. 1119]. Certain independent boats were considered "unfair," and visitation committees were put in operation in an effort to persuade the "unfair" boats to cooperate [Gov. Ex. 304, R. 1119].

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[6]This same witness testified that he dumped some shark carcasses during the period of the strike because he was unable to sell them [R. 483]. The record contains other evidence of dumping by non-member fishermen on account of their inability to sell at their usual markets. Another non-member fisherman testified that his "picket fees" were deducted from his share of the catch by his captain and paid over to the Union in order to avoid trouble [R. 868].

On June 13 the records [Gov. Ex. 225] of the appellant Association contain a reference to non-cooperative non-member boats and it was moved, seconded and carried "that the following boats be placed on the non-cooperative list as of June 15th. Same named boats be removed from list after straightening up with Local 36. If not straightened up within reasonable time will be put on a definite unfair list." This exhibit also shows that some of the boats named therein "will pay for pickets" [R. 1122].

On June 15, it became increasingly clear from the records of the Association that:

> Every boat from San Pedro and Long Beach area must have a clearance card to fish for the duration of the strike. Clearance card to be issued by Union. Any boat not complying with this order shall be unfair.
>
> Thereafter for the duration of the strike all fishermen shall be obligated to stand four hours picket duty every six days or pay for said four hours at the rate of $1.00 per hour. [Gov. Ex. 227, R. 1122].

On the same date it appears from the strike membership minutes of Local 36 [Gov. Ex. 228, R. 1122], that "all boats fishing from the San Pedro area for the duration of the strike shall have in their possession at all times a clearance card issued by the Union. That any boat not complying shall be put on the unfair list." The question of clearances and assessments was also discussed at this meeting, and under the discussion of clearance "it was pointed out that it is a serious matter to be put on the unfair list."

One of the means used by the appellants to force non-member fishermen into line was to deprive them of an opportunity to secure ice for their boats. On June 4 the As-

sociation minutes [Gov. Ex. 214] show that the Union Ice Company was contacted and was asked to honor the "clearance cards" of the Association and not to deliver ice to any fresh fish boat "who does not have one." [R. 1120].

2. Enlisting Cooperation From Third Parties to Force Dealers to Sign Contracts.

The record contains the testimony of an employee of an ice company, which supplied the fish dealers at San Pedro with ice in the usual course of business, to the effect that he made no deliveries of ice to the fresh fish dealers at San Pedro during the so-called "strike" [R. 558]. The route superintendent of this ice company testified that he received a telephone call from a man who said he was an official of the appellant Association requesting the cooperation of the ice company in not sending icing trucks into the San Pedro dealers' markets during the strike [R. 560]. A representative of this ice company also testified that any fish consigned to fresh fish dealers at San Pedro from Seattle, Washington, remained at his plant during the so-called strike until the dealers picked it up themselves, and that the fish freeze service of his company was available to fishermen as well as to dealers [R. 563-5].

The records of the appellant Association refer to the pressure put on the ice companies to refrain from delivering ice to the non-signing dealers [Gov. Ex. 304, R. 1119]. A letter dated May 31 mentions the contact of the Association with an ice company and recites that: "The Ice Company will also cooperate by no delivery of ice." [Gov. Ex. 28, R. 1118].

3. Activities of Appellants in Preventing Non-signing Dealers From Receiving or Shipping Fresh Fish From or to States Other Than California.

The boycotting and picketing of the non-signing dealers by the appellants and members of the appellant Association operated also to prevent common carriers such as the American Railway Express Agency and West Coast Freight Lines from making any deliveries of fresh fish to the usual places of business of the non-signing dealers in San Pedro during the so-called "strike" [R. 161-4, 171, 572-7, 640-3].

A representative of the Railway Express Agency testified that he visited the San Pedro dealers' docks at the time of the so-called "strike" and was told by one of the apellants that "they did not want our trucks to cross their picket line" [R. 573]. This witness also testified that the Agency's trucks were not permitted to pick up any outbound shipments from the San Pedro fish dealers during the so-called strike; and that if they made any deliveries to the non-signing dealers other than that of the fish then in route, the office of the Railway Express Agency in San Pedro would be picketed [R. 574].[7]

The local agent for the West Coast Fast Freight, another common carrier handling shipments of fresh fish from outside the State of California to the San Pedro fish

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[7]Written notice to the same effect was also sent to the Railway Express Agency by the appellant Association [Gov. Ex. 19, R. 576; R. 580].

dealers, testified that during the so-called "strike" his company delivered no fish to the San Pedro pier and that a portion of the fish consigned to the San Pedro fish dealers from points outside the State of California was re-delivered by his company to the Union Ice plant at Wilmington during the so-called strike [R. 642].

A dispatcher for the Los Angeles-Seattle Motor Express, another common carrier delivering fish to the San Pedro dealers from points outside the State of California, testified that on May 29, 1946, when the so-called "strike" commenced, he dispatched some fish to the San Pedro dealers which were not delivered but were diverted back to various dealers in Los Angeles [R. 655-6]. A driver for this company testified that on May 29, 1946, he was driving a truck for his company and was attempting to make a delivery of fish to the wharf of a San Pedro dealer when he was stopped by a picket and told that: "We got the place tied up." He finally delivered the load of fish to an icing plant at Wilmington [R. 821-3]. Another driver for the same company was told by one of the pickets for the appellant Association not to cross their picket line and that he could not back the truck up to the dock to make the delivery of fish to the dealer to whom the fish was consigned. He testified as follows:

> "In fact, they wouldn't let me in to the wharf, as far as that goes. So I was going to take the truck out on the highway and was going to transfer the fish from my truck to his [the dealer's] truck and he was going to bring it back in. I was told if that would take place that I would be followed."

Question: "You were told by whom?"

Answer: "The pickets. If that was to take place, that they would have somebody follow us and destroy the fish, or knock it off the truck or something." [R. 878-9].

This witness identified appellant F. S. Smith as having made the foregoing statement to him [R. 879].

Government Exhibit 303 [R. 1118] substantiates the testimony of the Railway Express agent relative to the effect of picketing in stopping shipments of out-of-state fish to the non-signing dealers. In this exhibit it appears that: "McLaughlin [one of the appellants] explained the R. R. Express was to notify all fish shippers, and that they would handle no fish, with our area as a destination," and that "We should finally grow up, show pressure, see that no fish be handled by the unfair markets." Government Exhibit 19 [R. 576] deals further with efforts of the appellants to force non-signing dealers into the price-fixing contract by notice to the Railway Express that "* * * there is now a strike pending in the San Pedro harbor area against the following concerns [the non-signing dealers]. We ask your cooperation in this matter. In the event that you should accept any fish for shipment from any of said concerns, we will then be compelled to advertise through a picket line the fact that you are accepting fish from these establishments during the pendency of a strike."

Government Exhibit 28 [R. 1118] shows that all trucks endeavoring to deliver fish to non-signing dealers had been stopped.

II.
SUMMARY OF APPELLANTS' ASSIGNMENTS OF ERROR.

An examination of the brief of the appellants shows that their appeal is based on seven principal assignments of error. They relate to:

I. The instructions given to the jury and the refusal to give certain instructions requested by the appellants;

II. The exclusion of certain evidence offered by the appellants;

III. The granting of a motion to quash subpoenas *duces tecum* served upon certain witnesses by the appellants;

IV. Alleged error in admitting evidence offered by the Government;

V. The contention that the Indictment does not state a public offiense; or

VI. That if it does, the evidence is insufficent to support a verdict; and

VII. That the grand jury which returned the Indictment and the petit jury which tried the appellants were improperly selected.

The appeal thus attacks the legality of the methods used in selecting the grand and petit jury panels (Assignment VII), the legal sufficiency of the Indictment itself (Assignment V) and certain rulings made by the District Court during and after the close of the trial on the merits (Assignments I, II, III, IV, VI).

III.

SUMMARY OF GOVERNMENT'S CONTENTIONS AND ARGUMENT IN REPLY TO THE ASSIGNMENTS OF ERROR.

The appellant Association and the 14 individual appellants involved in this appeal[8] are charged in the Indictment with having engaged in an unlawful conspiracy to fix, determine, establish and maintain arbitrary, artificial and non-competitive prices for the sale of fresh fish to dealers for fish caught in territorial and foreign waters off the Coast of California from Morro Bay to and including the territorial waters of the West Coast of Mexico, and to prevent dealers at fishing ports in Southern California who would not pay the fixed prices from obtaining, selling or shipping any fresh fish.[9]

The evidence offered by the Government supported the material allegations of the Indictment in every respect and was generally uncontradicted. It was one of the contentions of the Government on the trial of the case that, in accordance with the allegations of the Indictment, the fishermen members of the appellant Association were independent businessmen engaged in the business of catching and selling fresh fish on and for their own account and profit, and that the conspiracy to fix the prices of fresh fish moving in interstate commerce had had the intended

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[8]A verdict of acquittal was directed by the Court at the close of the Government's case as to one defendant, Floyd Sherman.

[9]The evidence showed that approximately 20,000,000 pounds of fresh fish were caught annually in the fishing area and sold to dealers at the fishing ports in the area, and about 1,000,000 pounds were shipped annually from points outside the State of California to dealers at the fishing ports in the area [Gov. Exs. 34 and 35, R. 842].

effects described in Paragraph 15 of the Indictment and was illegal *per se* under Section 1 of the Sherman Act. To this the appellants advanced three defenses:

(1) that if appellant fishermen were independent businessmen, they were original producers who could legally combine together to obtain uniform stabilized price agreements between themselves and wholesalers, and that the rule of reason prevents such conspiracies or price-fixing agreements from being illegal *per se;*

(2) that under the Fishermen's Marketing Act, an association need only be a "bargaining" agent for its members and that the activities of the appellants were only those of a fishermen's bargaining association engaging in legitimate activities;

(3) that under Section 6 of the Clayton Act the appellants' activities were only those of a labor union engaging in legitimate activities in negotiating for the sale of the labor of fishermen to dealers.

These defenses are obviously in the nature of pleas in confession and avoidance.

The Government contended that the first defense was wholly without merit under the law. To the second and third defenses, the Government replied that if the appellant Association and its members were operating under the Fishermen's Marketing Act, a conspiracy to force a price-fixing agreement on non-assenting dealers by coercive methods was a violation of Section 1 of the Sherman Act; and that if the appellant Association and its members were a labor union, no labor dispute existed between the members of the appellant Association and the fish dealers, as any dispute which might exist between them

was solely over the price or terms and conditions at which the members of the appellant Association would sell their fish to the dealers.

The Government accordingly submits that as to appellants' points I. A., B., C. (Appellants' Br. 33-84), the instructions given by the Court [R. 1940-43] adequately and fully covered the rights of the individual appellants to combine and act together for legal objectives under either the Clayton Act or the Fishermen's Marketing Act. The jury were also instructed [R. 1944-45] on the possible application of the Norris-LaGuardia Act to the evidence if they found as a fact that the relationship of employer-employee existed between the fish dealers and the fishermen, and that there was a "labor dispute" as defined by the Court, between the members of the appellant Association and the fish dealers.

The refusal of the Court to give the instructions requested by the appellants on Section 6 of the Clayton Act and the Fishermen's Marketing Act was not error since the instructions given by the District Court fully and completely covered any application of the Clayton or Fishermen's Marketing Acts to the evidence, and any rights the appellants might have under said laws. The instructions requested by the appellants did not properly state the law.

I. D. (Appellants' Br. 84-117)[10]—While the appellants apparently admit that a conspiracy to fix prices of products is illegal *per se* as an unreasonable restraint under the Sherman Act, their contention that the rule applies

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[10]For the convenience of the Court the numbers used in appellants' brief will be placed at the left-hand side of the first paragraph in which appellants' numbered contention is herein discussed.

only to aggergations of industrial capital and to situations where a combination has the power to fix prices to the consumer does not correctly state the law, and is without merit. The so-called "rule of reason" and economic justification argument, and any evidence offered in support thereof, is inadmissible and is no defense to a charge of price-fixing. These contentions of the appellants are therefore wholly without support in law, and are contrary to the rule in *United States v. Socony-Vacuum Oil Co., et al.,* 310 U. S. 150; and related cases (*United States v. Trenton Potteries Co.,* 273 U. S. 392; *Ethyl Gasoline Corp. v. United States,* 309 U. S. 436; *United States v. Masonite Corp.,* 316 U. S. 265).

I. E. (Appellants' Br. 118-122)—The appellants' contention that the Government must prove that the conspiracy would have a so-called "direct" effect upon interstate commerce in fresh fish is without merit, as the act of conspiring to perform an illegal act is in itself illegal where the intent or the necessary effect of the conspiracy is to enable the conspirators to restrain or control the supply or price of the commodity sold or moving in interstate commerce, or to discriminate as between would be purchasers of such products. *Coronado Coal Co. v. United Mine Workers of America,* 268 U. S. 295, at 310; *United Leather Workers Union v. Herkert & Meisel Trunk Co.,* 265 U. S. 457, at 471. It is not necessary under such circumstances to prove that the conspiracy would have had a direct effect on interstate commerce. The Indictment in the instant case charges that the appellants "knowingly" engaged in the conspiracy charged (Pars. 12-13) and that the conspiracy had the "intended" effect of, among other things, fixing the price at which fish was sold to signing dealers at arbitrary and non-competitive

levels (Par. 15). The verdict of guilty indicates that the jury found as a fact both that the appellants had the necessary intent, and that the effects of the acts were as charged in the Indictment. A person is presumed to intend the natural and probable consequences of his acts.

The contention of the appellants (Appellants' Br. 119) that a conspiracy to restrain commerce is legal unless it is intended to have a direct effect on commerce is likewise without merit for the same reason. *Coronado Coal Co. v. United Mine Workers of America, supra,* at 310.

I. F. (Appellants' Br. 122-123)—This contention is substantially the same as V and VI, and the answer of the Government to contention (F) is contained under those headings in this summary.

I. G., H. (Appellants' Br. 124-30)—The evidence of picketing and boycotting of the dealers was properly admitted. The Court instructed the jury that such acts in and of themselves were not contrary to or in violation of law, and that such evidence was to be considered by the jury in determining whether or not the appellants did or did not combine and conspire, as charged in the Indictment [R. 1942-3; see also R. 479]. The admission of such evidence was proper under the rule that activities or conduct which may be legal become illegal if part of, or connected with the carrying out of, an illegal purpose, plan or object. *Duplex Printing Press Co. v. Deering, et al.,* 254 U. S. 443, at 466; *Lynch v. Magnavox Co.,* 94 F. 2d 883, at 889 (9 Cir).

II. (Appellants' Br. 131-43)—It is the contention of the Government that the District Court properly excluded this evidence offered by the appellants, as it related wholly or principally to a defense of economic justification, which

is immaterial and has no application or relevancy to the issues where the appellants are charged with having engaged in a price-fixing conspiracy. Such conspiracies are illegal *per se* under the Sherman Act, and are not made legal by a defense of "economic justification." "Economic justification" evidence is likewise immaterial when the defense to the conspiracy charged is that the activities constituted the legitimate activities of either a cooperative marketing association, or a labor union. Contention D of this subheading is covered in this brief in reply to points III and I. E.

III. (Appellants' Br. 143)—The District Court properly granted the motion to quash the subpoenas *duces tecum* served by the appellants on certain witnesses, since the material sought by such subpoenas was wholly irrelevant and immaterial to the issues in the case, and related principally to the immaterial contention of the appellants that the Government must show that the conspiracy had, or if effective would have had, a direct and substantial effect upon commerce. The act of conspiring together to intentionally fix prices at any level for commodities sold in interstate or foreign commerce is without more a crime, and no direct effect on interstate commerce of the conspiracy itself need be proved in order to sustain the charges made in the Indictment. In any event, the record and evidence show such an effect in the instant case.

IV. (Appellants' Br. 144)—the contention of the appellants that the District Court erred in admitting summaries of items in books of account is without merit since the appellants were given ample opportunity to examine the books from which the summaries were made for the purpose of checking the accuracy of the summaries.

V. (Appellants' Br. 146)—The contention that the Indictment does not state a public offense under the laws of the United States is without merit since this contention is based on the fallacious assumption that the Indictment alleges facts which *per se* exempt the appellants from the provisions of the Sherman Act. No such allegations are contained in the Indictment.

VI. (Appellants' Br. 147)—The contention that the verdict is contrary to law and the evidence is likewise without merit. The Indictment does state an offense under the laws of the United States, and its allegations are sustained by the evidence in every material respect. The verdict of guilty was a proper and just verdict.

VII. (Appellants' Br. 148-201)—The contention that the panels from which the grand and petit juries were secured were illegally selected is without merit. There is no evidence in the record which shows that either the clerk or the jury commissioner intended to exclude any group or class by the methods used in securing names for the panels [R. 2524], and the record does not show that the methods of selection used in the instant case resulted in an arbitrary exclusion of or necessary discrimination against any group or class from the panels from which the grand and petit juries were selected. The appellants were deprived of no constitutional rights by the methods used in selecting the panels from which the grand and petit juries were secured in the instant case.

IV.
ARGUMENT.

The assignment of error argued in Point I of the appellants' brief deals generally with alleged error in the Court's instructions, and alleged error in refusing to give instructions requested by the appellants. The Government will herein consider those points under two headings: A. the instructions given by the Court, and B. the instructions refused. Points II.-VII., inclusive, of the appellants' brief will be considered herein under headings C.-G., inclusive, with appropriate title headings as previously indicated, and whenever practicable, the designated number or lettering given a point in appellants' brief will be placed at the left-hand side of the first paragraph in which appellants' numbered contention is herein discussed.

A. The Instructions Given by the Court Clearly State the Applicable Law.

It is fundamental that instructions to a jury must be construed in their entirety (*Stilson v. United States,* 250 U. S. 583, 588), and that it is not prejudicial error to refuse requested instructions where the Court has properly covered in his general charge the subject matter of the instructions requested (*Agnew v. United States,* 165 U. S. 36, 50; *Williamson v. United States,* 207 U. S. 425, 452; *United States v. Trenton Potteries Co.,* 273 U. S. 392). A reading of the entire charge given by the District Court shows that the jury was properly and thoroughly instructed as to the legal rights and liabilities of the appellants under any of the factual issues raised by the evi-

dence, and that whether the actual activities and conduct of the appellants were within the legal objectives of a fishermen's marketing association or a labor union was left to the jury.

I. D. The Court first instructed the jury that if they found that the fishermen members of the appellant Association were in fact independent businessmen, as charged in the Indictment, and that they had combined together with the other appellants to fix the price at which the individual fishermen would sell their fish to the dealers, that it was immaterial whether the price so fixed was reasonable or unreasonable [R. 1940]. This instruction covered the liability of the appellants in the event the jury found as a fact that there was a conspiracy as charged. The instructions given are supported by the following cases: *United States v. Socony-Vacuum Oil Co., Inc., supra; United States v. Trenton Potteries Co., supra; Ethyl Gasoline Corp. v. United States, supra; United States v. Masonite Corp., supra; Columbia River Packers Assn. v. Hinton, et al.,* 315 U. S. 143, 131 F. 2d 89 (9 Cir.).

The contention of the appellants that the Court erred in giving the foregoing instructions is based on the contention that a conspiracy to fix prices of commodities moving in interstate commerce is not illegal *per se* unless entered into by aggregations of industrial capital. Appellants apparently contend that "working producers" may enter into price fixing conspiracies because such agreements by "working producers" cannot possibly affect "consumer" prices. It is submitted that none of the foregoing decisions endeavors to distinguish between price-fixing conspiracies entered into by aggregations of industrial capital

and those entered into by so-called "working producers," and that it is not necessary to show that the price-fixing conspiracy affected "consumer" prices in order for the price-fixing conspiracy to be illegal.[11]

The enactment of so-called collective marketing acts and Section 6 of the Clayton Act gave original producers of food products and commodities as well as the individual unorganized worker the right to join with others in a like classification to collectively market their products or to bargain with an employer for the terms at which they would sell their labor.[12] The Fishermen's Marketing Act is illustrative of the former type of special statute enacted by Congress to give fishermen the right to collectively engage in certain activities therein described, and the Norris-LaGuardia Act was enacted by Congress to supplement

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[11]*United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 221. "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

[12]*Columbia River Packers Association v. Hinton, et al.,* 315 U. S. 143, 145. "We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norris-LaGuardia Act. That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment' 29 U. S. C. A. §113, calls for no extended discussion. This definition and the stated public policy of the Act—aid to 'the individual unorganized worker * * * commonly helpless * * * to obtain acceptable terms and conditions of employment' and protection of the worker 'from the interference, restraint, or coercion of employers of labor' 29 U. S. C. A. §102—make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities."

Section 6 of the Clayton Act to further protect the rights of labor in collective bargaining with an employer. It is submitted that in the foregoing decisions just referred to (*United States v. Socony-Vacuum Oil Co., Inc., et al.*, page 31 herein), the Supreme Court did not distinguish between price-fixing agreements entered into by aggregations of industrial capital and those entered into by so-called "original producers" or laborers who are given the right to combine together to carry on legitimate objectives authorized under the Fishermen's Marketing and comparable Acts, as well as under Section 6 of the Clayton Act. There is accordingly no legal basis for applying the so-called "rule of reason" to a charge of conspiracy to fix prices, of which the appellants have been found guilty in the instant case.

I. A. After charging the jury with respect to the rights and liabilties of fishermen to collectively organize as independent businessmen, the Court then proceeded in its instructions to cover the rights of fishermen to organize and act collectively under the Fishermen's Marketing Act [R. 1940-43]. The Court in its instructions followed the language of the Act in describing the type of association which could be formed under the Fishermen's Marketing Act [R. 1940-41], and then instructed the jury as to the type of collective action the fishermen might legally take under the Act. The Court then instructed the jury that an organization formed under the Act might enter into a contract with a buyer of fish which fixes the price "at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer" [R. 1942]. This was followed by an instruction to the effect that a fishermen's marketing association could not

force a dealer into a price-fixing contract by coercive activities or methods [R. 1942].

The instructions given by the Court are supported by the following cases: *Columbia River Packers Association Inc. v. Hinton, et al.,* 315 U. S. 143, 131 F. 2d 88 (9 Cir.), 34 Fed. Supp. 970, and see *Hawaiian Tuna Packers, Ltd. v. International, L. and W. Union,* 72 Fed. Supp. 562.

It is important to note that there is no evidence in the record which shows that the appellant Association itself collectively sells or "markets" any fresh fish for its members. Appellants contend, however, that what they call "bargaining" methods, ordinarily resorted to by labor unions in pursuing a legitimate labor union objective, constitute collective "marketing" under the Fishermen's Marketing Act (Appellants' Br. 37). They are thus in effect contending that the term "collective bargaining" means the same thing as "collective marketing" under the Fishermen's Marketing Act. Appellants are naturally forced to argue from this contention that a "collective marketing" right under the Fishermen's Marketing Act includes with it the right to picket and boycott a fish dealer as a labor union organization for the admitted purpose of forcing the dealer to sign a price-fixing contract of a collective marketing association. The conclusion is unescapable that under this interpretation an association can be both a labor union composed of laborers and a "marketing" association composed of independent producers at the same time. Such a combination for illegal purposes is clearly illegal. Combinations of labor and producers or businessmen to fix prices or to restrain commerce are clearly illegal under the law. *Allen Bradley Co. v. Local*

Union #3, IBEW, et al., 325 U. S. 797, and related cases cited therein.

The inconsistency of appellants' position in contending that they can be both a marketing association and a labor union at the same time is obvious. It is submitted that the position of a so-called producer, such as a fisherman who, independently of any employer, catches and sells a food product consumed by the public, is entirely different from that of a laborer who sells his labor to an employer who controls his actions or conduct.[13] If Congress intended so-called "producers" and "laborers" to be given the same rights in enforcing legitimate objects, it would have been unnecessary for Congress to have passed any of the special statutes such as the Fishermen's Marketing Act, authorizing the formation of collective marketing organizations to sell food products, as distinguished from groups of laborers organized in labor unions.

It is important to note that the appellants have cited no authority which sustains the proposition that labor unions and cooperative marketing associations, such as organizations formed under the Fishermen's Marketing Act, are one and the same and may perform the same

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[13]The members of a marketing association are in effect small businessmen who are subject to the direction and control of no one other than themselves. They produce and sell their products to the consuming public. To enable him to engage in orderly selling he is permitted to combine with others in the same classification to market his products in the most effective and orderly manner. He may through an organization of like producers withhold his product from the market or sell it at a time deemed most advantageous to all the members of the association. The laborer performs his service and receives his compensation when the service is rendered and is generally subject to the direction and orders of a superior in some manner and at some time although not necessarily so at all times.

acts and engage in the same activities in carrying out the legitimate objectives authorized under the special acts.

The Court did instruct the jury concerning the right of an organization formed under the Fishermen's Marketing Act to enter into a contract on behalf of its members with a buyer of fish which fixed the price "at which the association itself *or as sales agent for its members* sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer" [R. 1942]. This phase of the instructions on a fishermen's marketing association's activities covered the right of such an organization to enter into contracts with fish dealers as a "sales" or "bargaining" agent for its members.

The real question, however, and it is one which the appellants attempt to present under their assignments I. G., and H., relates to the rest of the instruction. This part of the instruction placed a legal limitation on the activities of a fishermen's marketing association in that it provided that an association of fishermen organized under the Act cannot force an admitted price-fixing contract on a nonsigning dealer by coercive methods. This part of the instruction reads:

> "Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto. I charge you that if you find as a fact that the defendant association is the type of association before described, any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association nor its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish un-

> der the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade" [R. 1942].

It is not disputed by the Government that an association properly organized and functioning under the Fishermen's Marketing Act may enter into contracts with individual dealers which provide for the price at which the products of the association or its members may be sold. Any such contract to be legal and valid must have the mutual assent of and be voluntarily entered into by both parties thereto. It must be the result of voluntary negotiations. Any contract entered into by either party as a result of coercive tactics, such as boycotting and picketing of the type resorted to by the appellants in the instant case, would obviously not be voluntarily entered into.

The charge given by the District Court thus clearly defined the limitation on the legitimate activities of a fishermen's marketing association. That there are legal limitations on the activities of such an association is indicated by the reasoning of the Court in the case of *Columbia River Packers Association v. Hinton,* 34 Fed. Supp. 970, where the Court stated:

> "Could it be maintained that a cooperative association of any of the types of producers named, having substantial control of production in their given field, could require of all buyers that they agree not to buy from any other producers, and could forbid and prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative? Research by counsel during the week's trial and my

> own research has not disclosed so extreme a claim by any cooperative marketing association in the long history of cooperatives.
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> * * * * * * * *
>
> "Since the union's contract does not guarantee a supply of fish, where would the canneries get fish, having agreed to look to the union for their sole supply. Surely reasonable men will agree that the public's interest in an important item of food supply should not be put in such jeopardy" (at 974-5).

Language from the same opinion was quoted with approval by Judge Fee in the case of *Manaka v. Monterey Sardine Industries,* 41 Fed. Supp. 531, at 534, and see *Hawaiian Tuna Packers, Ltd. v. International L and W Union,* 72 Fed. Supp. 563.

That the special marketing acts adopted by Congress authorizing producers to unite in preparing for market and in marketing their products and to make the contracts which are necessary for that collaboration does not give such organizations "carte blanche" to do as they wish and to force their contracts on unwilling buyers is clear. If such organizations exceed the legal limits of conduct authorized by the Act, they are subject to the Anti-trust laws. See *Columbia River Packers Association v. Hinton, supra.* In the case of *United States v. Borden Co., et al.,* 308 U. S. 188, at 204, the Court pointed out that these special acts "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." See also *United States v. King,* 250 Fed. 908; *Duplex Printing Press Co. v. Deering,* 254 U. S. 443; *Swift and Co. v. United States,* 196 U. S. 375, 396; *Midwest Theatres Co.*

v. Cooperative Theatres, 43 Fed. Supp. 216, 222; *Allen Bradley Co. v. Local Union #3, supra.*

It becomes apparent from the foregoing cases that there is no merit to the contention of the appellants that even as a cooperative marketing organization, operating under the Fishermen's Marketing Act, the appellants had a legal right to force a contract either as "bargaining" or "sales agent" for its members on buyers by coercive activities or tactics. It is submitted that there is no language in the cases, the law, special marketing statutes, or in the proceedings of Congress preceding the enactment of such statutes, which lends support to appellants' position, or which indicates that members of such organizations as fishermen's marketing associations may do anything other than join together for the collective purpose of carrying out the legitimate objectives of "catching, producing, preparing for market, processing, handling and marketing fish caught by their members."

Under the instructions as given, the jury could have found as a fact that the appellant Association and its members were a fishermen's marketing association operating under the Fishermen's Marketing Act. This fact would still not justify a verdict of acquittal for this fact alone would not permit the appellants to conspire together to force a price-fixing contract on non-assenting dealers by coercive methods and tactics, as charged in Paragraph 12 of the Indictment.

I. B. and C. After instructing the jury concerning the rights of the fishermen as independent businessmen and as members of a market organization organized under the Fishermen's Marketing Act, the Court proceeded to instruct the jury on the rights of fishermen under the Clayton and Norris-LaGuardia Acts. In its instructions, the

Court quoted Section 6 of the Clayton Act and then instructed the jury that whether the appellants came within Section 6 of the Act was to be determined by the relationship of the appellants and members of the association to the fish dealers [R. 1943]. The Court then instructed the jury that the appellant Association would not be a labor union if its members consisted of independent producers or persons who were self-employed and engaged in business on and for their own account free from such controls as an employer ordinarily exercises over an employee. (*Columbia River Packers Assn. v. Hinton,* 315 U. S. 143, 34 Fed. Supp. 970, note 5 at 976.) The Court continued that if the membership of the association consisted of persons who stood in the relationship of employees to the fish dealers they might legally combine together and legally carry on acts to affect changes in the terms and conditions of their employment even though such acts affected or obstructed interstate commerce, but that they might perform such acts only if there was a labor dispute between the members of the appellant Association and the fish dealers which affected the terms and conditions of their employment [R. 1944].

The Court then pointed out that if the jury found that there was a labor dispute as defined by the Court, that the terms and conditions of the employment of the members of the appellant Association by the dealers must be the matrix of any controversy or dispute between the members of the appellant Association and the dealers [R. 1944-5].

The Court then charged that if the jury found that there was not such a dispute or controversy between the members of the Association and the fish dealers and that the controversy was solely one over the price and terms and conditions at which the members should sell their fish,

and that the controversy or dispute did not involve or affect any employer or employee relationship, or was not the matrix of the controversy or dispute, that under such circumstances the members of the appellant Association would not be entitled under Section 6 of the Clayton Act to combine together to restrain trade and commerce as charged in the Indictment [R. 1945].

It is submitted that these instructions correctly stated and covered any rights which the appellants might have as a labor union under Section 6 of the Clayton Act or under the Norris-LaGuardia Act. (*Columbia River Packers Assn. v. Hinton, supra; Allen Bradley Co. v. Local Union #3, supra; United States v. Hutcheson,* 312 U. S. 219; *United States v. Brims,* 272 U. S. 549; *Truck Drivers Local #421, etc. v. United States,* 128 F. 2d 227 (8 Cir.).) See also *Hawaiian Tuna Packers Ltd. v. International L and W Union, supra.*

The contention that the Clayton Act or the Norris-LaGuardia Act by their express language or by implication *per se* exempts any association of individuals and their activities, whether as laborers or "working original producers" from the Anti-trust laws, is not sustained by any of the applicable decisions or cases cited by the appellants. In *Apex Hosiery Co. v. Leader,* 310 U. S. 469, the Court stated at 487:

> "A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor,* 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, this

> Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, 'Every contract, combination * * * or conspiracy, in restraint of trade or commerce' do embrace to some extent and in some circumstances labor unions and their activities and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it" [Citing *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 402, 55 L. Ed. 797; 34 L. R. A., N. S., 874; *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *United States v. Brims*, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791; *Local 167 v. United States*, 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804].

To call the members of the appellant Association "working original producers," or to give them some other descriptive title, does not bring them within or exclude them from any rights or privileges they may have under either the Clayton or Norris-LaGuardia Acts. One of the purposes of Section 6 of the Clayton Act and the Norris-LaGuardia

Act was to give individuals who sell their labor to an employer the right to combine together for the purpose of bargaining with an employer concerning the terms or conditions under which they will sell their services to the employer. It is obvious that one of the purposes of the Fishermen's Marketing Act was to give fishermen who raise or catch fish the right among other things to combine together to collectively sell their fish so that they might not be at a competitive disadvantage in selling their fish by competing with each other for the sale of their catch to dealers. In other words, the Fishermen's Marketing Act permits fishermen to pool their catch with other fishermen and to sell it collectively through an association owned and controlled by its fishermen members if they care to do so. If fishermen who work on fishing boats were selling "labor" to dealers owning and operating fishing boats, they could, of course, combine together in an association and such association as a labor union could act as a collective bargaining agency for its members in determining the price at which the members would sell their labor to the dealer. There is no evidence in the record of such relationship.

It is submitted therefore that the instructions given by the Court fully and adequately covered any rights the appellants may have had to combine together for any legitimate purpose under either the Fishermen's Marketing Act or Section 6 of the Clayton Act.

I. E. The contention that the charge of the Court with respect to the burden of proof imposed on the Government in price-fixing conspiracy cases was erroneous is likewise without merit [Appellants' Br. 118; R. 1803]. The appellants contend that the Government must prove that the alleged conspiracy *if* effective would have directly

affected interstate commerce in fresh fish. The Court charged that the Government must prove that the conspiracy was one to restrain in a substantial way the trade and commerce in fresh fish as charged in the Indictment [R. 1938]. When this instruction is read in connection with the rest of the charge, it is clear that it was surplusage and that it imposed a burden of proof on the Government that is not required in price-fixing conspiracy cases where the Indictment charges an intent to restrain interstate commerce or where the activities and conduct charged had that effect.

The Indictment in the instant case charges that the appellants *knowingly* engaged in a conspiracy to fix the price of fresh fish caught in the fishing area and sold to dealers [Par. 12 Indictment, R. 7-8] and that the conspiracy had the *intended effect* of fixing prices on fresh fish sold by the members of the appellant Association to signing dealers and of preventing fish from being sold or brought into the fishing ports for sale to non-signing dealers [Par. 15 Indictment, R. 11]. The Indictment thus charges the appellants with having conspired to fix the price of fresh fish moving in interstate and foreign commerce. It is the contention of the Government that when appellants are charged with having *knowingly* or intentionally conspired to fix the price of commodities moving in interstate commerce the amount of commerce involved in the conspiracy is immaterial, as it is the character of the restraint and not the amount of commerce involved that is made illegal by Section 1 of the Sherman

Act. *Montague & Co. v. Lowry,* 193 U. S. 38 [see also *Steers v. United States,* 192 Fed. 1, p. 5 (6 Cir.)].[14]

In *United States v. Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150, the Court pointed out at 224:

> "Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under Section 1 of the Act." [See also Note 59 on p. 224.]

The evidence in the instant case clearly shows that the conspiracy was knowingly entered into by the appellants for the expressed purpose of fixing and stabilizing the price of fresh fish caught and sold in the fishing area[15] and that the appellants caused the price of fresh fish sold by both the members and non-members of the appellant Association to be fixed and stabilized. Under the allegations of the Indictment, it was not necessary for the Government to prove that the conspiracy *if* effective would have had or did have either a substantial or direct effect upon the interstate commerce in fresh fish. It was sufficient, as charged in the Indictment, for the Government to prove that the conspiracy was formed for the purpose of fixing prices at some level for fish moving in interstate or foreign commerce and that it caused them to be fixed.

The cases referred to in appellants' brief are not price-fixing cases. They, therefore, do not support appellants'

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[14]However, the amount of fish which would have been subject to the price-fixing conspiracy in the instant case was in excess of 20 million pounds annually [Par. 10 of the Indictment; R. 6-7, 887].

[15]See for example the provisions of the price-fixing contract, Gov. Ex. A, attached to Indictment, Pars. (3), (4A), (4B), (4C), (4D) and R. 1387, 1562.

charge that the Court erred in giving the instructions complained of and in refusing to give the instructions requested by the appellants.

I. F. The objections of the appellants to the instructions that if the jury found that the appellants or any two or more of them had conspired to restrain interstate or foreign commerce in fresh fish as alleged in Paragraph 12 of the Indictment, any such appellants would be guilty as charged in the Indictment attacks the sufficiency of the Indictment as a whole. This contention of the appellants is substantially the same as that made in points V and VI of their brief. Since the jury returned a verdict of guilty as to all appellants, it may be assumed for the purposes of this contention, that the jury did find that the Government had proved the material allegations of the Indictment. The real question on this objection is—does the Indictment state a public offense under the laws of the United States.

It would unduly extend this brief to refer again in detail to the allegations contained in and the theory of the Indictment. It is submitted that there is no language or allegation in the Indictment which indicates that the conduct complained of therein is legal or that the appellants' activities as described in the Indictment are exempt from the provisions of Section 1 of the Sherman Act. Although the appellants make the statement that "It appears that on the face of the Indictment the subject matter thereof is a combination of fishermen, who, as working producers combined for the purpose of fixing the price of the products of their own labor" (Appellants' Br. 123), they point to no allegations in the Indictment which they contend have the legal effect of exempting the conspiracy described therein from the Sherman Act.

The foregoing statement by the appellants also assumes the existence of facts not contained in the Indictment nor the record and is the factual conclusion of the briefer. The cases previously cited by the Government clearly indicate that neither labor unions nor cooperative marketing organizations are *per se* exempted from the operations of the Sherman Act. It would unduly extend this brief to answer further this argument except to refer again to *Columbia River Packers Assn. v. Hinton, supra; U. S. v. Borden Co., et al., supra;* and *Allen Bradley Co. v. Local Union #3, IBEW, supra,* and similar cases, which it is submitted, support the Government's contention that the Indictment alleges a public offense against the laws of the United States under any possible theory or defense which the appellants have urged upon the Court in their brief.

I. G. and H. The Court properly instructed the jury that evidence of picketing and boycotting was to be considered by them in determining whether the appellants did or did not combine or conspire together as charged in the Indictment. It is submitted that evidence of picketing and boycotting under the allegations of the Indictment was properly admitted as bearing upon the issue as to whether the appellants had or had not conspired together as charged in the Indictment. The purpose for which the evidence was admitted was explained and properly limited by the Court both at the time of its admission and in the charge of the Court to the jury [R. 479, 1942-3]. While it may not be illegal *per se* to picket or boycott, such activity even

though legal may become illegal if part of an illegal object or purpose. *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, at 469; *Lynch v. Magnavox,* 94 F. 2d 883, at 889 (9 Cir.).

Here again the inconsistent positions taken by the appellants in the instant case becomes strikingly apparent. The appellants were endeavoring to use the tactics of a labor union in picketing and boycotting the fish dealers. Picketing and boycotting activities by labor union members would probably be legal if pursued in connection with the carrying out of a legitimate labor union objective. However, such conduct might well become illegal if pursued in connection with or as part of an illegal objective.

In the instant case, whether the appellant Association is one composed of independent businessmen or of fishermen organized and operating under the Fishermen's Marketing Act, or of "working original producers"[16] purporting to be a labor union, the picketing and boycotting activities of the appellants, if part of an illegal object or objective, *i.e.,* the price-fixing conspiracy charged in the Indictment, would be illegal.

It is accordingly submitted that the District Court properly and thoroughly instructed the jury as to the law applicable to the issues in the case and that there was no prejudicial error in the instructions given the jury by the District Court.

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[16]A phrase used frequently by appellants in their brief to refer to the fishermen members of the appellant Association. See for example 1.—B.-5 of appellants' brief, p. 59.

B. The Instructions Requested by the Appellants Were Properly Refused.

Under point I of their brief, appellants not only attack the charge to the jury as given by the Court, but they contend that the Court committed error in refusing to give certain instructions requested by appellants. The requested instructions are in substance based on the interpretation which they contend should be given to

(1) decisions of the Supreme Court on the rule of reason;

(2) the Fishermen's Marketing Act; and

(3) Section 6 of the Clayton Act.

These contentions have for the most part been heretofore discussed and answered in the previous sections of this brief. If, therefore, the District Court properly and thoroughly instructed the jury on all the issues in the case, as contended by the Government, and the instructions given covered the points raised by the appellants in any of their special requests, to such extent the District Court did not err in refusing such particular requests. If, on the other hand, the instructions requested by the appellants did not express the law, or were not applicable to any of the issues in the case, or were misleading and incomplete, such instructions were properly rejected (*Agnew v. United States, supra,* and related cases; *Holmgren v. United States,* 217 U. S. 509, at 521-524; *Erie R. R. Co. v. Purusker,* 244 U. S. 320, at 324).

I. D. 2. The instructions requested by the appellants on the so-called rule of reason [Appellants' Br., App. Q., 64-68] were not applicable to any of the factual issues raised by the Indictment, and do not state the applicable

law. The question as to whether a price-fixing conspiracy, combination or contract is reasonable or unreasonable is not one for the jury. Price-fixing conspiracies which are otherwise fully proved are *per se* unreasonable restraints, and the reasonableness of the prices so fixed or agreed upon is not a matter of inquiry. *United States v. Socony-Vacuum Oil Co., supra.*

The principal case relied upon by the appellants in support of the contention is *Appalachian Coals Inc. v. United States,* 288 U. S. 344. An examination of the opinion in this case shows that it was not a price-fixing case.[17] The Court held in that case that the appellants had not combined together to fix the price of coal to be sold in the market, stating: "The plan cannot be said either to contemplate or involve the fixing of market prices" (at 373) and "abundant competitive opportunities will exist in all markets where defendants' coal is sold" (at 375). The Supreme Court, however, ordered the District Court to retain jurisdiction of the cause and to "take further proceedings if further developments justify that course in the appropriate enforcement of the Anti-

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[17]The Government challenged the exclusive selling agency feature of the plan as affecting an unreasonable restraint of trade and an attempt to monopolize part of the trade and commerce in soft coal. As stated in the opinion, "The challenged combination lies in the creation by the defendant producers of an 'exclusive selling agency' " (at 357) which the Government contended eliminated competition among the defendants and also gave the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets (p. 358).

trust Act" (at 376). Thus it clearly appears from an examination of the opinion in the *Appalachian Coals* case that it was not a price-fixing case. In the instant case the evidence is undisputed that the conspiracy involved the fixing of market prices for fish sold to the dealers in a wide market, which included all the fishing ports in Southern California where fresh fish was landed and sold.

In the *Socony-Vacuum* case, *supra*, the defendants also relied on the *Appalachian Coals* case. The Supreme Court dealt extensively with that case in its opinion, distinguishing it as a non-price-fixing case, referring to and quoting (at 215) from the language in the *Appalachian Coals* case previously quoted herein. Other Supreme Court decisions previously referred to also clearly show that the so-called "rule of reason" has no application to price-fixing cases since combinations or agreements to fix the price of commodities in interstate commerce are illegal *per se* as unreasonable restraints of trade. (See also, *United States v. Masonite Corporation, supra; Ethyl Gasoline Corp. v. United States, supra; United States v. Trenton Potteries Co., supra.*)

I. A. 3. The instructions proposed by the appellants on the Fishermen's Marketing Act [Appellants' Br., App. I, 33-34] were likewise properly refused.

The argument in support of these instructions is succinctly stated on page 37 of the appellants' brief, where they contended that associations may qualify under the Fishermen's Marketing Act by engaging in collective mar-

keting only, and that *"collective bargaining" on behalf of the members of an association is collective marketing under the Act.*[18]

Here again the inconsistent position of the appellants, both as a labor union and a so-called marketing association, becomes immediately apparent. Appellants obviously confuse the legitimate activities of a labor union with the legitimate activities of a fishermen's marketing organization. Appellants regard "collective bargaining" by a labor union and "collective marketing" by a fishermen's marketing association as one and the same thing.

"Collective marketing" is undoubtedly a legitimate activity of a *bona fide* fishermen's marketing association and "collective bargaining" is undoubtedly a legitimate activity of a *bona fide* labor union. It does not follow, however, that they are one and the same thing and that activities which may legally be resorted to by a labor union in enforcing its collective bargaining rights may also be resorted to by a fishermen's marketing association in marketing or selling its products in competition with other sellers of the same product in the same markets.

If there is no difference between "collective bargaining" by a labor union and the "collective marketing" of food

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[18]The proposed Instruction No. 12 was obviously incomplete and deficient since it did not cover that phase of the conspiracy dealing with the efforts of the appellants to force a price-fixing contract on non-assenting dealers. The requested instruction did not, therefore, cover all the issues in the case. The proposed Instruction No. S-12 was likewise incomplete and misleading for the same reason. The word "cooperative" complained of by appellants' Instruction No. S-13 was not used in the charge of the Court. A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. *Erie R. R. Co. v. Purusker,* 244 U. S. 320, at 324; see also, *Sweeney v. Erving,* 228 U. S. 233; *Springer v. United States,* 102 U. S. 586.

products under the special marketing acts, as contended by the appellants, it was unnecessary for Congress to pass any of the special marketing acts for any labor union with farmers or fishermen among its members would be able to "collectively market" the food products raised by its farmer members or the fish raised or caught by its fishermen members. It is submitted that there is an obvious difference between an organization of food producers engaged in the production of food or the catching or raising of fish for the purpose of selling these food products to dealers or to the consuming public, and an association of individuals combined together for the purpose of collective bargaining for wages or compensation to be paid them by one with whom they have the direct or indirect relationship of employee.[19]

The difficulty with the appellants' requested instructions, as well as most of their other contentions, is that the appellant Association and its members were endeavoring to occupy the inconsistent position of being both a marketing association and a labor union at the same time. The result was that they were neither. There are, as above suggested, obvious distinctions and differences between the two types of organizations and the legitimate activities which either of such organizations may engage in without becoming subject to the Anti-trust laws. A further difficulty with the appellants' position in the instant case is

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[19]As pointed out in *Columbia River Packers Association, Inc. v. Hinton, et al.*, 34 Fed. Supp. 970, at 976, footnote 5: "The ideological foundation of American trade unions distinguishes between those who work for wages or salaries and independent producers or those who are self-employed, and the entire labor movement has been built on that distinction." One who sells fish and one who sells his labor are obviously not in competition with each other in the same market or with the same product.

that if the appellants were either a marketing or labor organization, their activities exceeded those lawfully permitted either type of organization under either the Fishermen's Marketing or Clayton Acts.

The cases relied upon and cited by appellants do not support the requested instructions. For example, the Court assumed in the case of *U. S. v. Dairy Cooperative Association,* 49 Fed. Supp. 475, that the defendant Association was a farmers' cooperative organization. The opinion gives no facts which indicate the basis of the assumption. It, therefore, does not indicate what constitutes a legal organization under the farmers' marketing statutes and what the legal limits are on the activities of organizations formed under the Fishermen's Marketing Act.

In *Columbia River Packers Association v. Hinton,* 34 Fed. Supp. 970, the Court treats the defendant Association as a cooperative association organized under the Fishermen's Marketing Act but the opinion of the Court provides no legal test as to what constitutes a fishermen's marketing association under the Act. In this opinion, the Court recognizes, but passes without comment the inconsistent position taken by the defendants in that case where they claimed, as in the instant case, that they were both a labor union and a fishermen's marketing cooperative association. In the unreported decision referred to on page 43 of the appellants' brief as *U. S. v. Columbia River Fishermen's Protective Association,* the Court again assumed that the association there involved was a fishermen's marketing cooperative without indicating what was legally necessary in order to constitute an association or "marketing" organization under the Fishermen's Marketing Act.

Liberty Warehouse Co. v. Burley Tobacco Growers Association, 276 U. S. 71, did not involve an organization formed under any of the Federal collective marketing acts. It is accordingly of no assistance to the Court in interpreting or construing any of the Federal cooperative marketing acts, particularly the one involved in the instant case. *Stark County Milk Association v. Tabeling,* 129 Ohio State 159, 194 N. E. 16, and *Johnson v. Georgia-Carolina Retail Milk Producers Association,* 182 Ga. 295, 186 S. E. 824, are likewise cases which involved activities conducted pursuant to state marketing acts. These decisions are neither persuasive nor obligatory authority in this Court. Such decisions cannot and do not aid the Court in any way in interpreting the Fishermen's Marketing Act or the legal limitations, if any, that are imposed on the activities of associations formed under such acts by Section I of the Sherman Act.

I. B. 3. The third set of instructions requested by the appellants [Appellants' Br., App. M, 42-48] was properly refused. These instructions related principally to the contention of the appellants that they were not guilty because their conduct, which would otherwise constitute a crime under the Sherman Act, was purged of any illegality thereunder by the provisions of Section 6 of the Clayton Act. Their argument, in support of this contention, is succinctly stated on page 74 of their brief wherein they suggest that an employer-employee relationship might exist between the fishermen and the dealers if there was basically a sale of labor plus a lack of equal bargaining power, even though the fishermen might be independent contractors.

An examination of this set of requested instructions shows that they are open to the same general objections previously made to substantiate all of the requested in-

structions (page 49 *et seq.*). They are replete with general terms that are ambiguous in meaning unless specifically defined in the instruction in which they are used. The instructions constantly refer to such terms as workers, laborers [No. 18], agriculturists [No. S-4], mutual help, legitimate objects [No. S-6], economic groups [No. S-10], independent contractors [No. S-8], etc., which are nowhere defined or described in the requested instruction. It is submitted that the failure to define the meaning of such general and ambiguous terms would in and of itself justify the Court in refusing the requested instructions, since they could only serve to confuse the jury as to the issues in the case. Further detailed objections might be urged in opposition to the ambiguous and general language of each of the requested instructions, as well as to their incompleteness and improper application to the issues in the instant case. It is submitted, however, that even a cursory reading of the instructions requested shows that many portions of the instructions are ambiguous and misleading and that they did not properly cover or relate to the issues in the case.

Many of the cases cited by the appellants in support of these requested instructions have been previously discussed and referred to, and it would unduly extend this brief to again discuss such cases. It is submitted, however, that such questions as to whether or not a fisherman obtains legal title to fish caught by him in coastal waters could not possibly be involved in or applicable to any of the issues raised by the Indictment. Cases which might possibly support such a proposition of law or issues of fact as those referred to on page 57 of appellants' brief will therefore not be further commented on.

The case of *Hopkins v. United States*, 171 U. S. 578, cited by appellants, relates to an agreement between live-stock commission merchants and charges made for services rendered. The case is cited by the appellants apparently for the proposition that personal services are not covered by the Anti-trust laws. The sale of personal services is not involved in the instant case and if it were, see the recent case of *American Medical Association v. United* States, 317 U. S. 519, *contra.* The case of *Anderson v. United States,* 171 U. S. 604, involved an agreement by dealers who bought and sold cattle. The Supreme Court especially reserved the question in that case as to whether the combination had fixed prices and if it had done same, whether it would have gone scathless.[20] The Supreme Court in the *Hinton* case, 315 U. S. 143, points out as a matter of law that on facts substantially the same as those of the instant case any dispute between the dealers and the fishermen related solely to the price at which the fishermen would sell their fish to dealers. No sale of "services" by fishermen to the dealers could possibly be involved as a jury question in the controversy in the instant case under this Supreme Court ruling.

The Labor Relations Act cases cited by the appellants are of no assistance in determining whether on the record in the instant case the fishermen do in fact stand in the relation of employee to the fish dealers and, if so, whether a labor dispute exists between the dealers and the fishermen under the Norris-LaGuardia Act; or whether the controversy between the dealers and the fishermen related

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[20]See also *Live Poultry Dealers' Protective Association, et al. v. United States,* 4 F. 2d 840, at 842 (2nd Cir.), for further discussion of both the *Hopkins* and *Anderson* cases.

solely to the price or terms and conditions at which the members of the appellant Association would sell their fish to the dealers. The record fails to show any dispute between the members of the appellant Association who own and operate fishing boats and members who were fishing on such boats as to the share of the catch to be allocated among themselves. Such a dispute might possibly be a "labor dispute" under the Norris-LaGuardia Act but that question is not presented in this case.[21] It is accordingly submitted that the cases cited by appellants do not support these requested instructions and that they were properly refused by the District Court.

I. E. 2. The objection of the appellants to the instruction covering the burden of proof imposed on the Government that the conspiracy, if effective, would have directly affected interstate commerce has been previously considered on page 44 *et seq.*, herein and it would unduly lengthen this brief to refer to it further.

It is accordingly submitted that the instructions given to the jury by the District Court correctly stated the law applicable to the issues and evidence in the case and that the District Court properly denied the mass of special instructions requested by the appellants.

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[21]See charge of Court [R. 1943] where the Court read the provisions of Section 6 of the Clayton Act to the jury and then said: "In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person."

C. The Court Properly Rejected Certain Evidence Proffered by the Appellants.

II. A., B., C. This assignment of error deals with the rejection by the District Court of certain evidence offered at the trial by appellants. It was contended at the time the evidence was offered that it was relevant to show the nature of the appellant Association; the applicability of Section 6 of the Clayton Act; the application of the rule of reason; and that fish dealers other than those picketed and boycotted by the appellants did and were able to buy all the fresh fish they desired. It is submitted that this evidence was properly rejected as irrelevant and immaterial and as not tending to prove or disprove any of the issues of the case.

The evidence offered by the appellants and rejected by the Court is described in appellants' brief on pages 131-132, 133-135, 136-140, 142-143. The appellants contend that the rejected evidence was material to show among other things that the appellant Association conducted activities relating to the marketing process; that organizations referred to by appellants as "collective bargaining associations" constitute an established and recognized form of "collective marketing organization"; that from an historical and economical point of view, fishermen have organized to bargain for the fish they catch in order to have a voice in the amount that they are paid for their labor; and that appellants' conduct involved merely a local controversy which had no impact upon interstate or foreign commerce.

II. A. 1. An example of the type of evidence contained in this proffer is that of the appellant Kibre, which is described in detail on page 132 of the appellants' brief. This proffer related to so-called "marketing" experiments

by the appellant Association in 1942 regarding the canning of barracuda. It is submitted that such evidence could in no way aid the jury in determining whether or not the appellants had engaged in a price-fixing conspiracy as charged in the Indictment, or what the true character of the appellant Association was in 1946.

The proffered testimony of the economic expert, John B. Schneider, concerning farming organizations and the similarity between the economic position of a farmer and a fisherman, and that agricultural marketing associations do not result in evils which usually flow from monopolies, was in the nature of "economic justification" evidence. It was offered to justify the acts of the appellants in conspiring to fix the price of fish caught by the members of the appellant association and to force the fish dealers into a contract establishing the prices to be paid by the dealers. Such evidence is not material when the charge is price-fixing, for reasons previously given.

II. B. The evidence described in B., 1., a. to f., inclusive, (Appellants' Br. 133-135) was of a similar character to that previously referred to and was likewise properly rejected by the Court as irrelevant and immaterial. An examination of the documents, Exhibits P and Q, shows that any material contained therein was obviously irrelevant and immaterial as well as self-serving. The Exhibits X and X-1 offered in evidence were copies of the National War Labor Board rulings holding that prices paid to fishermen under the circumstances involved in those cases constituted wages for the purpose of applying the provisions of the War Labor Board Act. It is submitted that such documents could likewise have no bearing on the issues in the instant case.

The general proffer of proof [Exhibit TT] contained nothing more than a mass of irrelevant material, some of which is described on page 135 of appellants' brief. Testimony to the effect that fishermen on the Pacific Coast have been organized on a labor union basis since 1886 would throw little light on the question of whether the appellant Association in the instant case was a *bona fide* labor union and, if so, whether the activities of its members in the instant case could be classified as within the legitimate activities of a labor union.

Fishermen might well be organized into labor unions under certain circumstances in order to bargain with the crew or operator of the boat on which they work for their compensation. But the evidence in the instant case, as in the *Hinton* case, 315 U. S. 143, shows that some of the appellants were boat owners and operators who as members of appellant Association had joined in the conspiracy to get higher prices for fish caught and sold to dealers. It is obvious that under such circumstances the boat owner would benefit from the conspiracy since the boat owner gets a share of the catch as well as the fishermen who fish therefrom.

Evidence that other agreements had been entered into between other associations and fish dealers would likewise be of no assistance to the jury or to the Court in determining the liability of the appellants in the instant case. Such evidence could only serve to present and raise collateral and confusing issues. The admission of this type of testimony would also necessarily have required the Government to present evidence as to the activities and true character of the organizations which were parties to such contracts in order to determine the similarities and

differences between such organizations and their activities and those of the appellant Association.

Even if the circumstances surrounding the execution of such contracts and their authorities were identical, such evidence would not legalize the action of the appellants in the instant case, for it is fundamental that a violation of law by one party is no defense to an action brought against another party committing the same offense. The fact that the Maritime Conciliation Service had participated in negotiations between other organizations and other buyers of fish would likewise be wholly irrelevant to the issues in the instant case.

Other evidence contained in Proffer TT which related to the fluctuation in the prices received by the fishermen, as well as evidence of the earnings of fishermen, would likewise have no bearing on the issues in the instant case. The proffered conclusions in the "Schneider offer of proof" that a fisherman is a "laboring producer" as distinguished from a capitalist and entrepreneur would likewise be irrelevant and immaterial evidence as being the conclusions of the witness and also improper as falling within that properly excluded as "economic justification" evidence. The question of whether or not the employer-employee relationship existed between the dealers and the fishermen was presented to the jury under proper instructions but its determination by the jury depended upon what the appellants themselves did in the instant case and not on what some other group or organization had or had not done.

Appellants contend that evidence of the foregoing character was relevant as tending to establish the fact that historically and from an economic point of view fishermen

should organize to bargain for the fish they catch. There is, of course, no legal objection to anyone organizing fishermen, if they wish to be organized. The Fishermen's Marketing Act permits them to organize or to be organized for the purposes therein stated. In the event any fishermen are employed or stand in the relation of employees to any employer, they likewise have a right to organize or to be organized, if they wish, as a labor union. But evidence of the actions of other labor unions or associations of fishermen, or decisions of administrative tribunals, such as the War Labor Board, could certainly by no stretch of the imagination be of any assistance to the jury in the instant case in determining the guilt or innocence of the appellants of the charges made in the Indictment.

II. C. The same answer applies and can be given to the appellants' contention that evidence which they contend related to the rule of reason was improperly excluded. Here again the proffered evidence (Appellants' Br. 136-140) dealt principally with the economic background of the fishing industry as a whole and a comparison between fishermen and farmers. It is submitted that such broad and general testimony as was contained in the appellants' proffer, and as described in their brief, was clearly irrelevant to the issues in the instant case, where the only real question presented was whether the appellants had entered into a price-fixing conspiracy as charged in the Indictment.

The evidence proffered could not legalize or immunize the conduct of the appellants against the charges contained in the Indictment. *United States v. Socony-Vacuum Oil Co., et al.,* and related cases, *supra.* The cases cited by the appellants in support of the admissibility of evidence of this character have been previously considered and do

not alter the rule of the foregoing cases. In fact, some of the cases, such as *Chicago Board of Trade v. United States,* 246 U. S. 231 (Appellants' Br. 141), cited and relied upon by the appellants in support of the admissibility of the proffered evidence in the instant case, were also relied on by the defendants in the *Socony-Vacuum* case. The Supreme Court stated in its opinion in the *Socony-Vacuum* case, *supra* (at page 214) that cases of the character of *Chicago Board of Trade v. United States, supra,* have no application to combinations operating directly on price or price structures.

The evidence in the instant case is conclusive that the price-fixing conspiracy described in the Indictment operated directly on and affected the price of fish sold to dealers at the wholesale level. The record clearly shows that the purpose of the conspiracy and of appellants' actions was to stabilize and fix the price at which the individual fishermen would sell their fish to the dealers. The cases cited by the appellants in support of the admissibility of the proffered evidence accordingly have no application in the instant case.

II. D. The proffered evidence that the 1946 catch of fresh fish for Southern California was three times as high as the 1942 catch; that the percentage of fresh fish caught and sold to dealers was a small part of the total catch of all fish caught in waters off Southern California, and similar evidence, was likewise properly rejected as irrelevant and immaterial. The appellants contend that such evidence was material as indicating that the controversy was a local one.

The price-fixing conspiracy described in the Indictment related only to fresh fish sold to dealers and did not involve any attempt to fix the price of fresh fish sold to

canners. However, the Indictment alleges and the evidence shows that over 20 million pounds of fresh fish are caught in the fishing area and sold annually to dealers at the fishing ports to which the conspiracy applied. The amount of fresh fish that may actually have been caught for the entire year of 1946, and the proportion of the entire catch which may have been sold to canners, certainly does not tend to prove or disprove the principal issue in the instant case as to whether the appellants did or did not conspire to fix the price of fresh fish sold to dealers in the Southern California fishing ports.

The fact that other fresh fish dealers at other Pacific Coast fishing ports or elsewhere, who were not picketed or foreclosed from a source of supply by appellants' activities, may have purchased fish from sources other than the appellants or were able to secure fresh fish during the so-called strike is likewise immaterial. It is not in dispute that dealers who signed the price-fixing contract with the appellant Association were able to and did secure fresh fish during the so-called strike. It is likewise not in dispute that non-signing fish dealers at San Pedro and Newport Beach did not and could not secure any fish at their usual place of business during the period of the so-called strike. Evidence of the latter character was clearly admissible to show the existence, terms and effect of the conspiracy described in the Indictment. As previously suggested, however, the fact that other fresh fish dealers were able to secure fresh fish during the so-called strike, or that a large amount of fresh fish was caught in coastal

waters off Southern California in 1946 does not tend to prove or disprove the existence of the conspiracy charged in the Indictment.

It is accordingly submitted that the Court properly excluded the evidence proffered by the appellants, and described in detail on pages 131-140, 142-3, of the appellants' brief.

D. The Court Properly Granted the Motion to Quash the Subpoenas Duces Tecum.

III. If the evidence which the appellants sought by the subpoenas was irrelevant or immaterial, or otherwise incompetent, there was no error in granting the motion to quash the subpoena. The proffer of the evidence which the appellants suggest would have been secured by the subpoenas *duces tecum* quashed by the order of the Court on April 18, 1947 is in the same category and classification as that described and dealt with under part C herein which the District Court properly rejected.

The evidence contained in this proffer was to the effect that a much larger quantity of fish comes in from areas outside Southern California than is caught in the fishing area involved in the conspiracy; that the price paid the fishermen for fish caught fluctuates considerably and bears no relationship to the amount charged for the fish sold by the dealers; that the price paid by the dealers in the various Southern California ports to the fishermen is substantially the same; and that fresh fish dealers in Southern California, other than those picketed and boycotted by appellants, were able to buy all the fresh fish they desired or could handle during the period of the so-called strike.

As previously suggested, the evidence referred to in this proffer has for the most part been considered under part

C (p. 59, *et seq.*) of this brief and to that extent will not be again considered herein. It is submitted that this proffered evidence is likewise irrelevant and immaterial and could only tend to confuse the jury and the issues of the case and would be of no material help to the jury in deciding the factual issues in the case. The evidence proffered is for the most part of the type that might be classified as that offered in support of an "economic justification" defense or in support of appellants' contention that the Government must show the direct effect on interstate commerce of the conspiracy described in the Indictment. The Government submits that the Indictment charges and the record shows that the trade and commerce which was the subject matter of the conspiracy was fresh fish in the approximate amount of 20,000,000 pounds annually. Both contentions have been previously considered and answered. The Government submits, therefore, that the motion to quash the subpoenas was properly granted as the evidence proffered thereunder would have been properly excluded.

E. The Court Did Not Err in Admitting Summaries of Items in Books of Account.

IV. It is submitted that this assignment of error is likewise without merit. The appellants were given an ample opportunity to examine the records from which the summary [Gov. Ex. 6] was made. The Court, however, did limit the inspection of the records by the appellants to that reasonably necessary to check properly the accuracy of the figures contained in the summary. The appellants, however, were not satisfied with a limited examination of the originals of the books of account. At the time the original records were submitted to the appellants for their examination in order to check the accuracy of the sum-

mary, they insisted that they had the right to examine the records *for any purpose*. The records in question contained the names of customers, etc., of the witness producing the same as well as records of sales made. The appellants were given every opportunity to examine the records for the purpose of checking the accuracy of the compilation prepared from the books of account.

It is submitted that a party is not entitled to inspect the original records from which a compilation is prepared for any purpose he may desire but that his examination of such records is limited to such as may be necessary to enable him to check the accuracy of any compilations prepared therefrom. To hold otherwise would permit an examining counsel to secure information as to customers, lists, etc., which in no way relate to the issues of the case or the purposes for which the compilation was submitted and offered in evidence. The compilation or summary here involved showed the total purchases and sales of fresh fish of the witness for the period July 15, 1945 to July 15, 1946, and indicated that the business of the witness was interstate in character and of a substantial volume. It was offered to corroborate the testimony of the witness and for the purpose of showing the amount of fresh fish landed at the wharf of the witness for the calendar year preceding the month of July 1946; the sales of fresh fish by the witness in and outside the State of California for the same period; and the fact that no fish were landed at the wharf of the witness or purchased by him at his usual place of business during the period of the so-called "strike" [R. 181-7]. It is submitted that any examination of the records from which the compilation was made, was properly limited by the Court in the exercise of its discretion to that necessary to enable the appellants to

determine the accuracy of the figures contained in the compilation. As suggested, however, the appellants contended that they had a right to examine the original records for any purpose whatsoever. To sustain their contention would obviously result in extending the examination permitted beyond the scope of that for which the compilation was offered and admitted. The Court was accordingly correct in refusing the appellants the right to conduct an *unlimited* examination of the original records in question.

The cases indicate that the purpose of allowing the inspection of the original records is to ascertain the correctness of the summary. Nothing in the cases supports the appellants' contentions that this inspection can be used as a means of discovery or that the opposing party can engage in a "fishing" expedition by an unlimited examination. *Augustine v. Bowles,* 149 F. 2d 93-96 (9 Cir.); *Harper v. U. S.,* 143 F. 2d 795 (8 Cir.). The case of *U. S. v. Mortimer,* 118 F. 2d 266 (2 Cir.), cert. den. 314 U. S. 616, relied on by appellants, does not support their contention. It merely states the general rule that the original records from which summaries are made must be made available for inspection to the opposing party. It does not hold that they must be made available for purposes other than to check the accuracy of a compilation prepared therefrom. In fact, there is authority for the proposition that where only the *net result* of the account books is desired, as in the instant case, that this fact may be proved by evidence independent of the records themselves. 4 Wigmore (3rd Ed.), §1244-7, p. 467-75. Under this rule, the Government could probably have dispensed with the production of a summary and relied on the testimony of the witness as to his approximation of the figures

as indicating the net results of the witnesses' books of account. This is but another reason which indicates that the ruling of the Court was not erroneous, or if so, that it was not a material or prejudicial error.

F. The Indictment States a Public Offense Against the Laws of the United States. The Verdict and Findings Are Sustained by the Law and Evidence.

V-VI. An examination of the appellants' brief in support of parts V. and VI. (Appellants' Br. 146-47) shows that the brief contains merely a statement of the contention without any extended argument or authority. The contention made under these assignments is substantially the same as that previously made by the appellants in their point I.-F. and previously answered by the Government herein on pages 46 and 47, namely, that a combination of fishermen who are "working original producers" for the purpose of fixing the price of the product of their own labor is exempt from the Anti-trust laws by the provisions of the Fishermen's Marketing Act and Section 6 of the Clayton Act. It would unduly extend this brief to restate again the answer of the Government to these contentions which we submit are wholly without merit.

The verdict of the jury must be sustained if there is substantial evidence to support it, taking the view most favorable to the Government. *Glasser v. United States,* 315 U. S. 60, 80.

As is stated by the Court in *United States v. Sorrentino,* 78 Fed. Supp. 425, at 428:

> "In considering the sufficiency of the evidence to sustain the verdict of the jury, this court must take that view of the evidence which is most favorable to the government; must give to the government the

benefit of all the inferences which reasonably may be drawn from the evidence; and must refrain from concerning itself with the credibility of witnesses and the weight of the evidence."

It is submitted that under the foregoing rules of law the verdict of the jury in the instant case is clearly sustained by the weight of the evidence and this assignment of error is accordingly wholly without merit.

G. The Panels From Which the Grand and Petit Juries Were Secured Were Properly Selected.

VII. A., B., C. The question presented by this assignment of error is raised by the defendants' motion to dismiss the Indictment on the grounds that the grand jury which returned the Indictment was improperly selected and that there were material departures from the form prescribed by law in the matter of the drawing and selection of the grand jury, in that it was drawn in such a manner that it was not an impartial grand jury drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally discriminated against and were excluded from the list of persons to serve as grand jurors. The motion recited that the defendants fall within the classes of persons which were so systematically and intentionally excluded from the list of persons selected to serve on the grand jury. The defendants also moved that the trial jury panel be stricken out in its entirety on the basis of the same allegations as were made with respect to the grand jury [R. 25-28].

The motions were denied by the trial Court [R. 28-29, 2573] after extensive testimony [R. 1968-2523], for reasons set forth in an opinion in which the evidence was reviewed and coordinated to the law of the subject [R. 2523-2573].

The burden of proof on the hearing of such a motion is on the moving party.

> "Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant." *Fay v. New York,* 332 U. S. 261, 285.

The questions raised by the defendants' motions involved issues of fact and law. However, certain questions were exclusively questions of fact, such as whether the clerk or jury commissioner showed any bias or prejudice in the selection of names or sources of names of prospective jurors; whether they systematically or intentionally or arbitrarily excluded any person or persons, or groups or classes of persons, either on account of or because of economic status, occupation, rate or quantity or method or time of pay, race, religious, sex, social connections or affiliations, or lack of them, or political affiliations; and whether the system and method or process used by the clerk and commissioner result in such exclusion.

The trial Court determined these factual issues adversely to the appellants [R. 28-29, 2573], and the trial Court's determination in this respect is entitled to the same respect as is the determination of any other question of fact committed to it. Its findings of fact must be affirmed if there is any substantial evidence to support them. *Reynolds v. United States,* 98 U. S. 145, 156; *Spies v. Illinois,* 123 U. S. 131; *Green v. United States,* 19 F.

2d 850 (9 Cir.). By statute, the trial Court is given the exclusive right and duty to determine these questions of fact. "* * * all challenges, whether to the array or panel, or to individual jurors for cause or favors, shall be tried by the court without the aid of triers." 28 U. S. C. A. §424, Jud. Code §287.

There is ample evidence in the record to support the findings of fact and the trial judge, and his interpretation and application of the law was without error.

(1) There Was No Systematic, Intentional or Arbitrary Exclusion of or Discrimination Against Any Person or Persons, or Against Any Groups or Classes of Persons.

The trial and grand jurors were selected from the same sources by the same procedure [R. 1968]. The jury commissioner furnished most of the names, though some were supplied by the clerk [R. 1986-7]. A master card file containing between 25,000 and 30,000 names of prospective jurors has been compiled over a period of years, and there are no memoranda accompanying the names in this file which indicate the race, color, religion or occupation of the prospective jurors [R. 1999-2000]. The addition of names to this master file has been a continous process since about 1925 [R. 2027].

The sources from which the names have been selected have been diverse. In recent years, some of the sources have been:

The Los Angeles County Telephone Directory [R. 2138-9; 2141, 2145, 2148-9];

A list of registered automobile owners [R. 2145];

A small number of names from women's clubs known as the Friday Morning Club [R. 2124, 2137] and the Ebell Club [R. 2137, 2141];

The Congress of Parents and Teachers [R. 2144];

The Southwest Blue Book, a social register [R. 2129, 2146, 2159-60];

Lists of names supplied by some Railroad Brotherhood Unions [R. 2130];

Lists of Negroes supplied by a Negro deputy clerk [R. 2067];

A list of Negroes from a Negro minister [R. 2150-1];

Personal property assessment lists [R. 2150];

A list of Chinese-Americans compiled by the clerk from naturalization proceedings [R. 2070];

A few names of Japanese-Americans supplied by a minister [R. 2152, 2164].

In the early 1930's, the jury commissioner secured a few hundred names from the following sources, which have not been used during the last fifteen years:

The labor temple [R. 2173];

The Los Angeles Country Club [R. 2150];

The University Club [R. 2126];

A list of tellers and employees of banks [R. 2494].

The clerk has never failed to make a card for any prospective juror on the ground or for the reason that he was a laborer working by the day or that he was a member of a labor union, and the lists contain many such persons [R. 2088-9]. Neither has he withdrawn a name because the prospective juror was a Negro [R. 2089]. There was a Negro on the grand jury panel under attack. A Negro served on the September 1946 Grand Jury. Negroes served on trial juries in that same term of court.

Negroes have served on grand and petit juries [R. 2001-2003].

The jury commissioner denied any discrimination against any person or class or group of persons on the ground that he or they were laborers, or because of occupation or pay or rate of pay or time of pay, or race, or because of union membership, or occupation [R. 2172]. The clerk testified to the same effect [R. 2094-5].

The telephone book was the source of nearly 5000 names out of approximately 7000 names supplied by the jury commissioner since 1943 [R. 2136-2160]. The jury commissioner had no means of determining the occupation, color or economic class or occupation of any person selected from the telephone book or from most of his other sources of names [R. 2172].

There certainly was no intentional handpicking of jurors from selected economic classes in taking names from a telephone book, a published list of registered automobile owners and personal property tax lists.

The selection of names for jury service is the responsibility and duty of the clerk and the jury commissioner. *Glasser v. United States,* 315 U. S. 60; *Walker v. U. S.,* 93 F. 2d 383 (8 Cir.); *United States v. Murphy,* 224 Fed. 554. Courts have no right to tell the clerk and jury commissioner how to discharge the duties and responsibilites imposed upon them by law, but have the power only to declare their actions null and void for malfeasance or misfeasance. *United States v. McClure,* 4 Fed. Supp. 668.

There is a presumption of regularity in the actions of the clerk and jury commissioner which must be recognized by the courts, and this presumption has not been overcome by the evidence in this case. In *Lewis v. United States,* 279 U. S. 63, 73, the Supreme Court said:

> "* * * as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown."

The testimony of the clerk and the jury commissioner positively established a lack of intention to exclude any classes of persons from the jury lists. The only evidence as to the intentions of the clerk and commissioner shows that they intended to broaden, and not to restrict, the representation of various classes of persons on the panel. Their efforts to secure the names of citizens of Chinese and Japanese ancestry, Negroes, representatives of labor unions, and their use of telephone directories as a principal source of names, indicates a desire on their part to insure the representation of minority groups and to have as many types of citizens as possible on the jury lists. There is an utter and complete lack of any proof that the clerk and jury commissiner intended to exclude any classes of persons, or deliberately utilized a system designed or effective to accomplish this result.

(a) The Testimony of Appellants' Expert Witness Failed to Prove Discrimination.

Appellants' expert witness, Robinson, testified that a comparison of the ratio of persons in the twelve major classifications of employment in the 1940 Census of Los Angeles to persons in these classifications in the 1946 and 1947 jury panels and juries demonstrated that there were an insufficient number of jurors in certain employment classifications, and that the method of selection of jurors therefore was not such as to secure juries which properly represented a cross-section of the community in so far as economic classification was concerned [R. 2226-50, 2254-2325].

The weight which should be given to this testimony depends upon the validity of appellants' premise that the 1940 Census Report establishes an ideal classification of persons by economic groups or classes, and that the extent of variance therefrom in the composition of juries demonstrates the extent to which the procedure in selecting the juries departs "from the form prescribed by law in the matter of the drawing and selection" of jury panels.

This basic premise of appellants is fatally defective. Census Bureau employment classifications are not established upon the basis of income or economic status, but upon the characteristics of the kind of employment [R. 2228]. Furthermore, the relative percentage of persons in each Census employment classification has no relationship to the percentage of eligible jurors who may be found in each classification [R. 2253-4, 2334-5].

As the trial judge pointed out in his decision, it is impossible to conclude that persons who are included in the category of "professional and semi-professional" neces-

sarily fall into any recognizable or identifiable economic class, either by reason of incomes or their economic and social thinking. Defendants have made no showing, and indeed it would be impossible to make a showing that artists, art teachers, trained nurses and student nurses, professional workers, dancers, athletes, actors, social and welfare workers, and other professional and semi-professional workers (all of whom are included in one generic classification so far as appellants' analysis is concerned) all have similar incomes and economic views, or that they are in a different economic class than appellants, or that they would be biased and prejudiced against the appellants because of a difference in economic status [R. 2543-4].

Similarly, appellants made no showing that railroad conductors, government officials, managers of garages and dry cleaning shops, owners of grocery stores and restaurants, and railroad presidents (all of whom fall in one Census classification) possess any common economic status or views or comparable income or social outlook on life, and that even if it existed, it would be so different from that of appellants to result in prejudicial bias against them.

The number of persons falling into each Census Report classification of occupation has no relationship to the number of persons in each occupation classification who are eligible for jury service [R. 2253-4, 2334-5]. Appellants can hardly carry their argument so far as to contend that a jury must contain representatives of classes of persons who are not eligible for jury service, as that would be a patent impossibility. The Census Report includes in the various job classifications an unknown number of aliens, minors, and persons who were not in California for a sufficient time to become eligible for jury

service [R. 2254]. This fact militates against the acceptance of the number of persons in each job classification as the perfect or ideal standard for the composition of a jury panel.

Since appellants' testimony [R. 2271-84, 2313-4, 2318-9, 2403, 2417-8] rests upon the premise that a deviation in juror employment classification from the ratios in the Census Reports shows that the method of selection of juries was improper, they should first have established the validity of the necessary preliminary premise—namely, that the ratios in the Census reports were ideal for jury service. This they failed to do.

The trial Court made an independent examination of the same questionnaires which were the basis of the testimony and conclusions of defendants' expert witness [R. 2535]. The trial Court found that 165 out of 167 occupations listed in the Census Report were represented on the 1946 and 1947 jury panels [R. 2554]. This fact certainly justified the trial Court's finding [R. 2573] that there had not been any intentional and systematic exclusion of jurors on the ground of their occupation, and that the method of selection which was followed by the clerk and commissioner resulted in an extremely wide and complete diversification of employments represented on jury panels.

In addition, appellants contended (Appellants' Br. 173-4) that in excusing jurors, the judges excused too many in the lower economic classifications, and thus aggravated the defects which they contend were inherent in the method of selection of the jury panels. It is not clear whether appellants contend that the judges, by indiscriminate excuses, have been guilty along with the clerk and

commissioner, of "systematically and intentionally" discriminating against those classes of persons mentioned in appellants' motion.

The appellants' witness stated further that the use of questionnaires, recommend by the Conference of Senior Circuit Court Judges, contributes to this same result, in view of the fact that more people in higher economic classifications would respond to the questionnaires than would persons in lower classifications [R. 2395-7]. It appears to be their belief that it was the duty of the judges in excusing jurors, to excuse more of those in higher economic classifications than in lower ones, and that to this extent, the discretion of the judges in excusing jurors was limited and had been abused.

These contentions demonstrate how far appellants have departed from a reasonable concept of the meaning of the words "systematic and intentional discrimination." There is no difference, with respect to intent or end result, between the action of the jury commissioner in selecting names from the telephone book, and the action of the judges in excusing jurors who were members of lower economic classes. There is no contention by appellants of any improper motivation or evil intention on the part of the commissioner, the clerk, or the judges. However, appellants appear to contend that the actions of all of them contributed to the lack of impartiality complained of, from which appellants deduce that the jury panels were improperly selected and that there were departures from the form prescribed by law in the matter of drawing and selection of juries.

(b) The Presumption of Regularity in the Methods Used in Selecting the Panel Has Not Been Overcome.

The burden is upon appellants to establish that there were material departures from the form prescribed by law in the matter of the drawing and selection of the grand jury and the petit jury. To do so they must overcome a presumption of regularity in the activities and operations of the clerk and jury commissioner. The existence of this presumption is well established. In *Lewis v. United States,* 279 U. S. 63, 73, the Supreme Court said:

> "* * * as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown."

Appellants have not carried this burden of an affirmative showing to overcome the presumption of regularity.

Appellants do not rely upon any direct evidence of deliberate and intentional discrimination by the clerk and commissioner. Instead, they argue that they were entitled to a jury drawn from a panel upon which laborers, people working by the day or hour, members of labor unions and negroes would be represented by approximately *the same proportion* of members of those classes as exist in the community. They contend that a failure of the clerk and jury commissioner to obtain such a panel amounts to systematic and intentional discrimination.

As the trial Judge stated [R. 2565]:

> "Proportional representation is not possible, nor is it permitted or required under the law * * * If proportional representation on a panel is not required, then disproportional representation is not invalid, unless it is the result of a systematic and intentional exclusion of persons or groups by the clerk or the commissioner, either directly or by the intentional devising of a system or method of selection, which is bound to result in such systematic exclusion."

Having no evidence to prove intentional or systematic exclusion or discrimination, appellants contend that lack of proportional representation of certain classes on the jury panels shows that the clerk and commissioner must have had the intention to discriminate which is essential before lack of proportionate representation will be held to be improper.

The Supreme Court said in *Fay v. New York,* 332 U. S. 261, at 291:

> "Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. Akins v. Texas, 325 U. S. 398. If the Court has hesitated to require proportional representation where but two groups need be considered and identification of each group is fairly clear, how much more imprudent would it be to require proportional representation of economic classes. * * *"

Appellants rely heavily upon *Thiel v. Southern Pacific Company,* 328 U. S. 217. In that case, the clerk testified that in making his selections for jury service he did not include persons who worked for a daily wage. This was

direct evidence of deliberate and intentional discrimination against such persons. Evidence of this nature is completely lacking in the instant case.

On retrial of the *Thiel* case, the trial court accepted a panel which had been selected by the same standards as in this case. (67 Fed. Supp. 934.) Circuit Judge Healy, in his concurring opinion on appeal to this Court, 169 F. 2d 30, 32 (9 Cir.), commented:

> "* * * It is probably open to debate whether the practice squares in all respects with the views expressed by the Court in the opinion reversing the earlier judgment, *Thiel v. Southern Pacific Co.*, 328 U. S. 217. Cf. also Ballard v. United States, 329 U. S. 187. The trial judge thought it did. Obviously any method devised in an effort to obtain a fairly representative group of jurors will be open to criticism, for it is not possible even to approximate perfection along this line. Persons qualified and available for jury service do not readily yield to classification in a society so fluid as ours. They cannot be neatly pigeonholed like specimens of rock or mineral. Most people, on close inquiry, are found to be classifiable logically in more than one group, and it is only in the case of color, and perhaps creed, that strict lines can be drawn.
>
> "Like my associates, I am content to rest decision of the point on the trial judge's review of the evidence as to the procedure adopted. If a conscious effort is to be made to obtain a representative cross-section of the community on the basis of such information as is available in telephone books, city directories and the like, I suppose the method employed is as fair as any so long as no particular group as a whole is systematically excluded, and no claim of that kind can be

asserted here. It is doubtless true that the percentages used do not accurately reflect census figures, but a good faith effort appears to have been made to give substantial representation to both sexes and to all racial and economic groups. Cf. Fay v. New York, 332 U. S. 261."

There has been no showing of malfeasance or misfeasance by the clerk or jury commissioner, by way of intentional and systematic discrimination against or exclusion of any classes of jurors, such as would empower the court to declare their actions null and void or unlawful.

(c) Appellants Have Failed to Establish Prejudice to Themselves.

Appellants have failed to establish any prejudice as a result of the method of selection of jury panels which would justify the Court in granting their motion.

In *Fay v. New York,* 332 U. S. 261, 291-293, the Supreme Court said:

"No significant different in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it. It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. There is of course legitimate conflict of interest among economic groups, but they are so many and so overlie each other that not all can be significant. There is entrepreneur and wage-earner, consumer and producer, taxpayer and civil servant, foreman and laborer, white-collar worker and manual laborer. But we are not ready to assume that these differences of function degenerate into a hostility such that one

cannot expect justice at the hands of occupations and groups other than his own. Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries.

"Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but *cf. Strauder v. West Virginia,* 100 U. S. 303, 306-309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional."

It was the burden of appellants, not only to establish that there had been an intentional and systematic discrimination against certain classes, but also that appellants were within one of the classes so discriminated against. Appellants' motion stated that they "fall within the classes of persons" which were excluded, but the evidence does not contain an iota of proof in this respect. Appellants have sought only by categorical, unverified pleading to meet this fundamental requirement of eligibility to challenge the jury upon the grounds set forth by them.

Appellants' motion sets forth certain classes which are alleged to have been discriminated against, to-wit: laborers, people working by the day or hour, members of labor unions, and Negroes.

At the conclusion of their testimony, appellants sought to amend the motion by including among these specified classes "operatives and kindred workers, domestic workers, service workers," and "Americans of Mexican descent," and to allege that "proprietors, managers and officials were systematically and intentionally favored" [R. 2497-2502]. They introduced no evidence to show that any appellant was a laborer, or a person working by the day or hour, or a Negro, or an operative or kindred worker, or a domestic worker, or a service worker, or an American of Mexican descent. At the time of the hearing and decision upon their motion, the trial court was without enlightenment concerning the economic classification of appellants or any of them, except as alleged in the Indictment. The Indictment alleged [R. 7] that:

> "The fishermen who are members of Local 36, IFAWA are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit."

The evidence subsequently introduced during the trial of this case shows that the following appellants were boat owners: F. R. Smith [R. 1471]; George Knowlton [R. 1577-82]; W. B. McComas [R. 1596]; Arthur D. Hill [R. 1705]; C. Lloyd Munson [R. 1694-5]; Robert M. Phelps [R. 1603]; Burt D. Lackyard [R. 1698]. Appellant Otis M. Sawyer owned a boat in 1945 [R. 1455].

The record shows that appellant Jeff Kibre was secretary-treasurer of the International Fishermen and Allied Workers [R. 1128]; Gilbert Zafran was secretary-treasurer of appellant Association [R. 1512-1515]; Harry A.

McKittrick was a business agent for appellant Association [R. 1748]; Charles McLauchlan was business manager for a union [R. 1611]. The Indictment identifies Clifford C. Kennison as an assistant business agent of a union [R. 5]; and Ray J. Morkowski as business agent of a union [R. 5], and no evidence was introduced controverting these statements.

Thus, according to the allegations of the Indictment and the evidence introduced at trial, all of appellants were either the owners of fishing boats or were employed in the capacity of managers or officials. Thus, they clearly fall in the Census classification of "proprietors, managers and officials"—the very classification which they charge was over-weighted in the jury panel.

This not only demonstrates the absurdity of adopting Census employment classifications as definitions of "economic classes," but also shows clearly that appellants have established no valid basis for their contention that the grand jury and petit jury would be inherently biased or prejudiced against them.

This leaves but one ground for their objection to the constitution of the jury panels, that is, their contention that members of labor unions were excluded. The appellant Association is described in the Indictment as an unincorporated association affiliated with the Congress of Industrial Organizations, and the individual appellants are identified as officials or members of that Association. Assuming, *arguendo,* that the appellant Association is a labor union, and that the individual appellants are therefore members of a labor union, the appellants still have failed completely to show that there was any discrimination, intentional or otherwise, against members of labor

unions in the selection of the jury panels. Not only did the appellants fail to produce evidence to this effect, but their own witness, Robinson, testified [R. 2411-2417] that he had not attempted to make any analysis of the jury panels with respect to membership or non-membership in labor unions, and that he thought it likely that there would be members of labor unions in practically all of the classifications used by him. The witness said:

> "I think you will find union groups scattered almost completely throughout every one of those specific occupations, and in fact rather than waste time I am quite willing to grant it." [R. 2416.]

The Clerk testified [R. 2089] that he had never failed to make a card for any prospective juror whose questionnaire indicated that he was a laborer working by the day or that he was a member of a labor union, and that there were many such persons on his lists.

The appellants offered no evidence to show that they were not the owners of telephones or that their names did not appear in the telephone directories used by the clerk and jury commissioner. They failed to offer any evidence to the effect that they were not the owners of automobiles and that their names were not included in lists of registered automobile owners. They failed to offer evidence that they were not owners of taxable personal property and that their names were not on personal property tax rolls of the type used by the clerk and the jury commissioner. Their failure to offer proof of this nature, and, in fact, any proof whatsoever to show that they fall with-

in the class of persons whom they contend were discriminated against, leads to the presumption that they could not present such evidence.

Thus, appellants failed completely to show that they were members of any class which had been the subject of intentional and systematic discrimination in the selection of jurors, and they failed to show that there was any discrimination against any group or class of which they were members.

It is apparent from the entire Record that the appellants were businessmen engaged in the business of catching and selling fish for their own account and profit. Where their residences are identified in the Record, they are shown to be located in communities from which jurors were drawn. There is certainly no recognizable difference in the economic status of one who fishes on shares in a commercial enterprise and one who is the proprietor or operator of a small commercial enterprise located on shore. Appellants have totally failed to carry their burden of showing that any class or group of persons was intentionally and systematically excluded from the jury panel, and the burden of showing that they were members of any class or group which was discriminated against.

It may be that methods of selecting jurors can be devised to the end that there will be proportional representation of all strata of economic, occupational and religious groups, but to do so would require a much greater selec-

tivity than is now employed by the Census Bureau, and would call for a greatly augmented jury commissioner's staff.

The Court, in exercising such supervisory control over jury matters as is called for in the decision in the *Thiel* case should exercise that supervision with regard for the fact that there is no statutory provision for the payment of expenses involved in an elaborate jury impanelment machinery, and certainly the jury commissioner cannot be said to have been guilty of malfeasance or misfeasance in failure to provide such machinery on a budget of $15.00 per year [R. 2142, 2171].

It is accordingly submitted that the panels from which the grand and petit juries were secured were properly selected, and appellants' motion to dismiss the Indictment on the contrary ground was properly overruled.

Conclusion.

We submit that since the Indictment stated an offense under the laws of the United States; that since the verdict and findings are supported both by the law and the evidence; that since the instructions given by the trial Court were clearly correct; that since the trial Court did not err in refusing to give certain instructions offered by appellants, and committed no prejudicial error in excluding certain evidence offered at the trial by appellants; that since the trial Court properly granted the motion to quash the subpoenas *duces tecum,* and was correct in admitting summaries of items contained in books of account; and

since the panels from which the grand and petit juries were drawn were selected properly, the judgments of conviction entered upon the jury's verdicts of guilty should be affirmed.

Respectfully submitted,

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